ii. Permissible Restrictions on Harassing Speech

In R.A.V. v. St. Paul, Minnesota enacted a statute that prohibited cross burning and display of Nazi swastika.[24] Scalia, writing for the majority, stated that the law was content based because it regulated solely on the content of the speech and that you cannot regulate content just because it is offensive or harmful.[25] However, if the government were to forbid speech across an entire class of regulations, then this would be acceptable because it does not interpose a government opinion.[26]

The Supreme Court has held that speech may be limited where it poses a "clear and present danger."[27] Furthering this line, the Court has held that speech which incites violence towards the government is impermissible,[28] that schools may limit speech based on the time, place, and manner so long as that limitation did not discriminate against certain ideas,[29] and that "fighting words" that the speaker knows to be offensive or made to provoke an altercation are not protected.[30]

In Virginia v. Black the Court held that outlawing cross burning was permissible under R.A.V. but struck down the provision that evidence of cross burning may be used to establish a prima facie case of intimidation.[31] Justice Thomas, in his dissent, rejected the rationale of the Court that the cross burning, especially in southern states, was used to express a viewpoint other than racial intimidation.[32]

The courts do not always require imminent violence or incitement of violence to restrict speech. As more focus has shifted to protecting those facing harassment in the workplace and schools, the courts have stated that when speech becomes so "severe" or "pervasive" that it "undermines and detracts from the victim's educational experience."[33] The concern when

restricting speech in this manner is that harassing speech victims have been "effectively denied equal access" to the facilities provided by the institution.[34]

iii. Captive Audience Doctrine and the Workplace

The Supreme Court has held that when a "'captive' audience cannot avoid the objectionable speech" then the government may be permitted to prohibit that "intrusive" speech.[35] The most common example of a captive audience is a person inside their home who is held captive there by the intrusion of speech that they cannot escape.[36] However, the courts have repeated that a captive audience is not confined strictly to the home, but can extend to public spaces where the audience is bound to go.[37]

Justice Stevens wrote that while it may be within the right of someone to display an offensive message to viewers there is no "unqualified constitutional right to follow and harass an unwilling listener, *especially one on her way to receive medical services*." (emphasis added.)[38]

Courts have often found that work may be restricted in the workplace.[39] In Aguilar v. Avis Rent A Car System, Inc, the Supreme Court of California held that even speech that may be protected in some spaces, may be restricted based on the time and place without violating the First Amendment.[40] In Aguilar, employees were subject to repeated racial slurs in the workplace by their employer.[41] The court concluded that injunctive relief for the plaintiffs was a justified and permissible restriction on speech and furthermore refused to deny continued injunctive relief in the event of further abuse outside the hearing of the plaintiffs.[42]

III. COURT'S DECISION

In the noted case, The California Court of Appeals for the Third District concluded that the pronoun provision of SB 219 did not survive strict scrutiny as a content-based restriction because the method used to advance the State's goals was too restrictive on free speech protections.[43]

The Court first addressed the principles that underlie the free speech protections under the First Amendment.[44] The case law, as collected, conveys that this right protects from the forced adoption of a government message and prevents the government from "cleans[ing] the public debate" by protecting speech that some audiences may find offensive.[45] However, the Court also acknowledges that this is not an absolute right and that the government may restrict speech where said speech offers little value as compared to the benefit to social order or morality in its restriction.[46] As an example, the Court used Aguilar v. Avis Rent a Car System Inc. where the California Supreme Court held that civil liability for harassing speech does not violate First Amendment protections when it is so "severe or pervasive to constitute employment discrimination."[47] Under this interpretation, "mere utterance" of a racial slur, while offensive, would not be considered discrimination severe enough to trigger civil liability without triggering an analysis of potential infringement on free speech.[48]

The Court next discusses how strict scrutiny is applied to government regulations on free speech when they are content-based restrictions.[49] A law is considered content-based when it "'targets speech based on its communicative content' and 'applied to particular speech because of the topic discussed or the idea or message expressed.'"[50] From here, the Court addresses each of the Government's arguments: (1) that the law has benign motive;[51] (2) that it is content neutral because it does not demand caretakers speak in a certain way;[52] (3) that the law is not a reflection of the government's motives but that of the residents that it protects;[53] and (4) that the law is

content neutral because pronouns act as "stand-ins" for nouns and thus do not convey political messages.[54]

The Court rejects the Government's first argument citing REED that laws which are facially content-based, which the Court considers SB 219, are automatically subject to strict scrutiny regardless of seemingly benign justifications.[55] The second argument is dismissed on the grounds that the First Amendment protects not only speech but "compelled silence" as well.[56] The Court briefly rejects the third argument stating that the government may not compel persons to express the views of others if that message contradicts with their own opinion.[57] Finally, the Court rejects the fourth argument reasoning that by passing the law the Government understood that misgendering a person was both offensive and that it conveyed a belief that a person's gender cannot be changed from that assigned at birth.[58]

Next, the Court addressed the applicability of Reed and the Government's argument that SB 219 should be held to a lesser standard of scrutiny under the "captive audience doctrine."[59] In the view of the Court, residents in elder care facilities were comparable to "listeners" in other captive audience cases, particularly in regard to persons within their home, but that in this case was distinguishable because the "speakers" were not analogous and thus refused to lower the standard of scrutiny.[60] The Court refused to classify employees as their own category of captive audience but recognized the First Amendment's interest in protecting the interests of employees within their workplaces and the lack of precedent in favor of exempting employees from such protections.[61]

After concluding that strict scrutiny was the proper review standard, the Court agreed that the government had a compelling interest in passing SB 219 after considering the research advanced by the Government as to the discrimination that LGBTQ+ persons face when

considering entering long-term care facilities.[62] However, the Court did not view criminalizing misgendering in these facilities to be sufficiently narrowly tailored to advance the state's interest in protecting LGBTQ+ seniors.[63] Notably, the Court also rejected Taking Offense's proposed alternative of imposing civil liabilities under an employment based law that prohibit employees from misgendering residents.[64] The Court reasoned that civil penalties would not necessarily be less restrictive on free speech protections than criminalization unless some showing could be made to that effect.[65]

The Court then turned to the challenge of the room assignment provision and held that the provision did not run afoul of the equal protection clause of the Fourteenth Amendment because transgender residents are not "similarly situated" to non-transgender residents and the law does confer special rights to transgender residents.[66] The Court first establishes that strict scrutiny is appropriate for their analysis as sex based classifications are considered suspect for equal protection claims.[67] Furthermore, after Bostock, LGBTQ+ distinctions, including transgender status, are considered sex based classifications.[68] In the opinion of the Court, the argument that all sexes should be considered similarly situated because they are protected under the same umbrella classification was too broad.[69] Instead, the correct metric is whether the sexes are similarly situated in the given circumstances.[70] Here, the court concluded that transgender residents were similarly situated to non-transgender residents on the grounds that both groups were subject to gender-based room assignments.[71]

Applying strict scrutiny, the Court considered first whether the law created a special right in the assignment of rooms as compared to the rights of non-transgender residents before concluding that no such special right was created.[72] The Court explains that the law creates a rule that is unlawful to assign a transgender resident to a room not in accordance with their gender

identity and creates the exception that it is not unlawful for a transgender resident to be assigned to a room in accordance with their biological sex if requested by the transgender resident.[73] This provision does not create an "affirmative right" that a transgender resident's request for reassignment be honored by the facility only that a facility may not be penalized for such reassignment if it is requested by the transgender resident.[74] As such the Court concluded that the law, in regard to the room assignment provision, did not constitute an equal protection violation nor an infringement on the right to intimate association.[75]

IV. ANALYSIS

Three issues arise from the decision of the California Court of Appeals: two errors of the court and one troubling trend in free speech jurisprudence. First, the court misinterprets the statute that incidental misgendering would rise to the level intended for penalty under the statute and fails to recognize repeated and willful misgendering of transgender patients amounts to severe and pervasive conduct enough to create a hostile environment.[76] Second, the court fails to apply the captive audience doctrine to the residents of long-term care facilities.[77] Third, current free speech precedent is inconsistent and does too little to protect classes subject to hate speech and rhetoric.

While the court recognizes that the government has a compelling interest in protecting elderly LGBTQ+ residents, it nevertheless concludes that criminal, as prescribed by SB 219, and civil, as suggested by Taking Offense, penalties "restrict more speech than is necessary" to achieve that goal.[78] The court states that employees who make "isolated" or "off-hand" remarks about a resident's gender will be subject to criminal penalties.[79] In making this determination the court entirely overlooks the purpose and nature of the statute. The law does not seek to restrict

the viewpoint of an employee, what they may express outside of working hours, or what they say in the presence of people unaffiliated with the care facility. It also does not restrict singular incidents of misgendering or incidents where the employee was unaware of a resident's pronouns.[80] The law, instead, seeks to impose penalty on repeated and willful acts that would constitute severe and pervasive harassment of residents in these facilities.

The court did correctly view criminal sanctions as an overreach of the government in this case as it too severely restricts speech.[81] However, the court's position that civil penalties would also be too restrictive on speech is concerning for the future of anti-discrimination law.[82] If the state has no means of enforcement for anti-discrimination laws, then any statutory protections written for cognizable suspect classes would lose their bite. It is important to preserve remedies and enforcement mechanisms to ensure that anti-discrimination laws are not written merely as symbolic protections but that they also carry the full weight of law.

Second, the intent of the California legislature was to prevent open discrimination against transgender residents inside of their home so that they may feel safe inside. In considering the captive nature of the residents, the court engages in a circuitous argument that while residents of long-term care facilities may be considered captive audiences, the speakers of the offensive language are not comparable to the typical speaker in a captive audience case.[83] The court states that they are not applying the captive audience doctrine to employees while simultaneously treating their concerns the same as those in captive audiences.[84] Relying, in part on Aguilar, the court considers that employees cannot easily go elsewhere to express their views.[85] However, this case is distinguishable from Aguilar because in that case an employer was expressing racial slurs to create a hostile environment for the employees from which they were not compelled to leave.[86] The court in Aguilar held that it was permissible to grant an injunction to prevent the

employer from continuing speech that amounted to discrimination.[87] In the noted case, the employees are more akin to the employers from Aguilar in that they are the party that create the hostile environment for residents. Offending employees should either be restricted in their harassing speech or find other more appropriate places to express their vitriol.[88] The residents may not easily remove themselves from the environment due to cost or the situations which have placed them in care facilities. Furthermore, if they were able to leave one facility based on the hostile environment created by constant and repeated misgendering, they would have no guarantee that their new living situation would be free from the same harassment.[89]

Lastly, the current jurisprudence of the courts is pushing the First Amendment to be at direct odds with the Fourteenth Amendment.[90] This Note does not intend to suggest that the First Amendment should be entirely impinged, however it does mean to express that the courts should perhaps reevaluate how they interpret the First Amendment and how they define harm when the government seeks to impose liability on those whose speech serves no function other than to insult and degrade those who seek protection under the Fourteenth Amendment. The decision of the California court is consistent with the current jurisprudence of First Amendment interpretation,[91] but it is a continued example of how courts refuse to treat transgender individuals with the same dignity afforded other protected classes.

The evolution of First Amendment jurisprudence takes us from practical limitations to a now absolutist view that speech should be permitted in nearly all contexts regardless of the direct or secondary harm created by that speech. If the jurisprudence of Reed and the ideology expressed in Taking Offense are to become, and remain, the standard, then there is significant worry as to the legitimacy of any anti-discrimination law. For example, a law prohibiting sexual harassment could be impeded because it is within the constitutional right of the harasser to

express their view about a woman's appearance. Likewise, a law prohibiting racial discrimination could be impeded because a real estate agent truly believes that African American's are harmful to the neighborhood.

In either example, laws prohibiting language that is offensive could be categorized as content-based and would thus likely fail under a strict scrutiny analysis. However, we are unlikely to see a court push Reed this far in the context of sexual harassment towards non-transgender women, or in the racial discrimination context, because equal protection demands we limit speech. Yet, the courts allow the viewpoint that transgender people's identities are up-for-debate and that this "debate" is constitutionality protected. The courts have accepted certain groups are afforded more protections, but still treat transgender individuals as somehow less deserving of such respect and recognition by the law.

If the courts are to interpret transgender rights under the framework of Bostock and include them under the umbrella of sex discrimination, then they must treat transgender causes the same as those of non-transgender people. The courts must recognize that reasonable limitations on speech are required to prevent discrimination; especially in spaces where people are required, expected, or necessitated to be, such as long-term care facilities.

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[1] Taking Offense v. State, 281 Cal. Rptr.3d 298 (Cal. App. 3d Dist. 2021).

[2] Id. at 305.

[3] Id.

[4] Id.

[5] Id.

[6] Id. at 307.

[7] U.S. Const. amend. I.

[8] U.S. Const. amend. XIV.

[9] See Spencer Bradley, Whose Market is it Anyway? A Philosophy and Law Critique of the Supreme Court's Free-Speech Absolutism, 123 Dick. L. Rev. 517 (2019).

[10] Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

[11] Ward v. Rock Against Racism, 491 U.S. 781, 789 (1989).

[12] Reed v. Town of Gilbert, 576 U.S. 155, 176-77 (Breyer, J., concurring)

[13] Id.

[14] Gitlow v. New York, 268 US 652, 666 (1925).

[15] Ward, 491 U.S. at 791-92.

[16] See Leah K. Brady, Lawn Sign Litigation: What Makes a Statute Content-Based for First Amendment Purposes, 21 Suffolk J. Trial & App. Advoc. 320, 334-35 (2016).

[17] Id. at 33-34.

[18] Reed, 576 U.S. at 159.

[19] Id. at 165 (citing Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429 (1993)).

[20] Id. at 181 (Kagan, J., concurring) (quoting McCullen v. Coakley, 134 S. Ct. 2518, 2529 (2014)).

[21] Id. at 181-82 (Kagan, J., concurring) (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 386 (1992)).

[22] Reed at 180 (Kagan, J. concurring) (quoting Williams-Yulee v. Florida Bar, 135 S. Ct. 1656, 1666 (2015)).

[23] Id. at 179 (Kagan, J., concurring).

[24] 505 U.S. 377, 379 (1992).

[25] Id. at 381.

[26] Id. at 387.

[27] Schenck v. United States, 249 U.S. 47, 52 (1919).

[28] Gitlow, 268 U.S. at 668.

[29] Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 513 (1969).

[30] Chaplinsky, 315 U.S. at 571-72.

[31] Virginia v. Black, 538 U.S. 343, 663-64 (2003)

[32] Id. at 388-98 (Thomas, J., dissenting).

[33] Davis v. Monroe Cty. Bd. Of Educ., 526 U.S. 629, 651 (1999).

[34] Id. at 633.

[35] Frisby v. Shultz, 487 U.S. 474, 487 (1988).

[36] Id. at 484.

[37] Madsen v. Women's Health Center, Inc., 512 U.S. 753 (1994).

[38] Id. at 781 (Stevens, J., concurring).

[39] Aguilar v. Avis Rent A Car System, Inc., 87 Cal. Rptr.2d 132, 136 (Cal. 1999)

[40] Id. at 158 (Werdegar, J. concurring).

[41] Id. at 136.

[42] Id. at 150-51.

[43] Taking Offense, 281 Cal. Rptr.3d at 305.

[44] Id. at 308-309.

[45] Id. (quoting Cohen v. California, 403 U.S. 15, 25 (1971)).

[46] Id. at 309. (quoting R.A.V., 505 U.S. at 382-83). See also Aguilar, 87 Cal. Rptr.2d 132.

[47] Aguilar, 21 Cal. 4th at 134.

[48] Taking Offense, 281 Cal. Rptr.3d at 310 (discussing Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1986)).

[49] Id. at 310.

[50] Id. (quoting Reed, 576 U.S. at 163).

[51] Id. at 311.

[52] Id. at 312.

[53] Id.

[54] Id. at 313.

[55] Id. at 311.

[56] Id. at 312 (Discussing Wooley v. Maynard, 430 U.S. 705 (1977); Riley v. National Federation of Blind, Inc., 487 U.S. 781, 796-97 (1994)).

[57] Id. See also Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo, 418 U.S. 241 (1974).

[58] Id. at 313.

[59] Id.

[60] Id. at 315.

[61] Id. at 315-16.

[62] Id. at 316-17.

[63] Id. at 320.

[64] Id. at 318-19.

[65] Id. at 319.

[66] Id. at 324.

[67] Id. at 321-22.

[68] Id.

[69] Id. at 323. (quoting Michal M. v. Superior Court of Sonoma County, 420 U.S. 464, 469 (1981)).

[70] Id.

[71] Id. at 324.

[72] Id. at 324-25.

[73] Id. at 324.

[74] Id. at 325.

[75] Id.

[76] Id. at 309-10.

[77] Id. at 315.

[78] Id. at 319-20.

[79] Id. at 319-20.

[80] See Meritor Savs. Bank v. Vinson, 477 U.S. 57. 67 (1986) (single utterances of offensive slurs is not enough to invoke speech restrictions).

[81] Id. at 319. See also Ashcroft v. ACLU, 542 U.S. 656, 660 (2004); Ashcroft v. Free Speech Coalition, 535 U.S. 234, 244 (2002).

[82] Id.

[83] Id. at 315.

[84] Id.

[85] Id.

[86] Aguilar, 21 Cal. Rptr.2d at 160-61.

[87] Id. at 168.

[88] See e.g. Frisby v. Shultz, 487 U.S. 474 (1988); Madsen v. Women's Health Center, Inc., 512 U.S. 753 (1994).

[89] Taking Offense, 66 Cal. Rptr.3d at 316-17.

[90] See Genevieve Lakier, Reed v. Town of Gilbert, Arizona and the Rise of the Anticlassficatory First Amendment, 2016 Sup. Ct. Rev. 233 (2016).

[91] See Reed, 576 U.S. 155.

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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The Honorable P. Casey Pitts
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Dear Judge Pitts:

I currently clerk for the Honorable M. Kendra Klump in the Southern District of Indiana, and I am writing to express my interest in joining your chambers as a law clerk for your inaugural 2023-24 term. I graduated from Washington and Lee University School of Law in 2022 knowing I wanted to pursue the experiences clerkships offer. I am interested in continuing my clerking career with you due to the commitment to equal and meaningful access to justice that you have demonstrated throughout your career as an advocate for fundamental civil rights.

As one of Magistrate Judge Klump's inaugural law clerks, I had the unique experience of cultivating, adjusting, and honing my research, writing, and organizational habits to meet the fast-pace and high demand of being in the Southern District of Indiana cooperatively with and alongside Judge Klump. The majority of my time is spent preparing memoranda for Judge Klump's daily conferences has that week; researching, analyzing, and synthesizing issues from all aspects of civil law arising in any of ~350 cases for which I am responsible for; and drafting orders of varying length and complexity. That time is balanced with participating in a personable chambers environment and engaging in meaningful, informative discussions about whatever the anecdote of the moment may be. My clerkship with Magistrate Judge Klump has substantially sharpened my research, writing, and organizational capabilities and taught me the demands necessary to be efficient and effective as a law clerk. Judge Klump is willing to serve as a telephone reference and can be reached at (317) 229-3973. My list of references is available on the next page.

My commitment to continuing my clerking career is driven in part, as my resume and transcript suggest, by my tendency to seek out experiences that focused on and allowed development of my legal research and writing. These experiences shaped how I think of the law and undoubtedly prepared me for the deep analysis and detail-oriented research and writing necessary for and only enjoyed through a clerkship. My time clerking for Judge Klump and my externship in law school with then-Magistrate Judge Robert Ballou in the Western District of Virginia confirmed my passion.

I firmly belief that if you want to truly understand the law and how it impacts people, you must get proximate to the administration of justice. This is why I want to clerk in your chambers and participate as you continue your commitment in your new role as a District Judge. I appreciate your time.

Respectfully,
/s/ *Josh Clardy*

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I currently clerk for Judge Klump. I consider Judge Klump to represent my "one legal employer" reference.

My post-graduate career began with this clerkship. Any other legal employer reference would be from during law school and come with the caveat that my summer internships occurred during the COVID-19 pandemic.

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After his daughter saw me get hit by a car, I interned for Judge Martin Hoffman during the Spring of 2019 observing trials and motions practice; and during the Summer of 2020, observing virtual hearings and preparing bench memos.

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Professor Teaney taught my Advanced Federal Procedure: Environmental Practicum during the Spring of 2022. One of the Writing Samples submitted was prepared for his course.

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EDUCATION

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Mock Trial Competition, *Quarterfinalist*
William B. Spong Jr. Moot Court Competition, *Participant*
Involvement: W&L Undergraduate Mock Trial Program, *assistant coach*
OutLaw, *member*

Rhodes College, Memphis, TN
B.A., Philosophy, December 2018
Thesis: "Fixing the Perspectives in Perspectival Realism"
Athletics: Varsity Soccer, NCAA DIII All-American (2016, 2017, 2018)
Involvement: Mock Trial, *Competitor and Assistant Coach*
Philosophy Club, *Event and Community Coordinator*

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Title 18's "Property" Conundrum (Act I) (forthcoming, 2023).
Insider Trading's "Property" Conundrum (work in progress, with Prof. Karen E. Woody).

EXPERIENCE

United States District Court for the Southern District of Indiana, Indianapolis, IN Jan. 2023 – Present
Inaugural Law Clerk to Magistrate Judge M. Kendra Klump. Assisted in drafting orders in a variety of civil matters. Routinely researched issues, drafted memos, and presented oral analysis relating to pre-trial matters and prepared daily material to keep pace with a caseload of 350-400 cases.

United States District Court for the Western District of Virginia, Roanoke, VA Sept. 2021- May 2022
Judicial Extern to then-Magistrate Judge Robert S. Ballou. Drafted memos on complex legal issues regarding conflicts of law in contract claims, substantive state procedural law in federal court, and *in loco parentis* under the FMLA. Engaged in chambers conversations about drafts, upcoming hearings, mediations, and trials.

Kropf & Moseley, Washington D.C. Summer 2021
Legal Intern. Researched and drafted memos for boutique white collar defense firm on issues such as mitigating role under Federal Sentencing Guidelines, whether forfeiture statutes applied to *Klein* Conspiracy charge under 18 U.S.C. § 371, and current legal landscape for qualified immunity and *Bivens* claims in the EDVA.

Washington and Lee University School of Law, Lexington, VA
Co-Author with Professor Karen Woody. (Feb. 2021 – Present). Presenting the foreseeable challenge in Title 18 insider trading prosecutions for qualifying the inside information traded as "property" based on the recent developments in Supreme Court's mail fraud jurisprudence and the historical conceptualization of property.
McThenia Research Assistant. (May 2020 – May 2022). Conducted research for various law professors on specific, complex topics, such as: state-by-state analysis of COVID-19 pandemic to restrict access to abortion; First Amendment and common law protections provided to media reporting on unripe criminal investigations.

68th Civil District Court for Dallas County, Dallas, TX Spring 2019; Summer 2020
Legal Intern to the Honorable Martin Hoffman. (2020). Attended remote hearings and trials. Prepared memo on application of judicial proceedings privilege to breach of contract claim arising out of non-disparagement clause violations; *Intern*. (2019). Observed hearings, jury selection, and trials and assisted in daily administrative tasks.

INTERESTS

Reading contemporary fiction, philosophy, and legal opinions (Favorite Authors: Raymond Carver, George Saunders, Albert Camus, Circuit Judge Stephanos Bibas), playing soccer, watching hockey, and running.

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COURSE			ATT	COM	GRADE	POINTS
LAW-FALL SEMESTER 2019-20						
LAW	109	CIVIL PROCEDURE	4.0	4.0	A	16.00
LAW	140	CONTRACTS	4.0	4.0	B	12.00
LAW	163	LEGAL RESEARCH	0.5	0.5	A-	1.84
LAW	165	LEGAL WRITING I	2.0	2.0	B	6.00
LAW	190	TORTS	4.0	4.0	A-	14.68
Term	Cmpl Cr: 14.5	GPA Pts: 50.52	GPA Cr: 14.5		GPA: 3.484	
Cumul	Cmpl Cr: 14.5	GPA Pts: 50.52	GPA Cr: 14.5		GPA: 3.484	

The COVID-19 pandemic required significant academic changes.
Unusual enrollment patterns and grading reflect the disruption
of the time, not necessarily the student's work.

LAW-SPRING SEMESTER 2019-20						
LAW	130	CONSTITUTIONAL LAW	4.0	4.0	CR	0.00
LAW	150	CRIMINAL LAW	3.0	3.0	CR	0.00
LAW	163	LEGAL RESEARCH	0.5	0.5	CR	0.00
LAW	166	LEGAL WRITING II	2.0	2.0	CR	0.00
LAW	179	PROPERTY	4.0	4.0	CR	0.00
LAW	195	TRANSNATIONAL LAW	3.0	3.0	CR	0.00
Term	Cmpl Cr: 16.5	GPA Pts: 0.00	GPA Cr: 0.0		GPA: 0.000	
Year	Cmpl Cr: 31.0	GPA Pts: 50.52	GPA Cr: 14.5		GPA: 3.484	
Cumul	Cmpl Cr: 31.0	GPA Pts: 50.52	GPA Cr: 14.5		GPA: 3.484	
LAW-FALL SEMESTER 2020-21						
LAW	201	ADMINISTRATIVE LAW	3.0	3.0	B+	9.99
LAW	216	BUSINESS ASSOCIATIONS	4.0	4.0	B+	13.32
LAW	233	CRIMINAL PROCEDURE-INVESTIGATI	3.0	3.0	A-	11.01
LAW	285	EVIDENCE	3.0	3.0	A-	11.01
LAW	318	INSIDER TRADING SEMINAR	2.0	2.0	B+	6.66
Term	Cmpl Cr: 15.0	GPA Pts: 51.99	GPA Cr: 15.0		GPA: 3.466	
Cumul	Cmpl Cr: 46.0	GPA Pts: 102.51	GPA Cr: 29.5		GPA: 3.475	
LAW-SPRING SEMESTER 2020-21						
LAW	265	CRIMINAL PROCEDURE-ADJUDICATIO	3.0	3.0	B+	9.99
LAW	300	FED JURISDICTION & PROCEDURE	3.0	3.0	B+	9.99
LAW	385P	NEGOTIATION/CONFLICT RES PRAC	2.0	2.0	A	8.00
LAW	390	PROFESSIONAL RESPONSIBILITY	3.0	3.0	B	9.00
LAW	410	SECURITIES REGULATION	3.0	3.0	A	12.00
Term	Cmpl Cr: 14.0	GPA Pts: 48.98	GPA Cr: 14.0		GPA: 3.499	
Year	Cmpl Cr: 29.0	GPA Pts: 100.97	GPA Cr: 29.0		GPA: 3.482	
Cumul	Cmpl Cr: 60.0	GPA Pts: 151.49	GPA Cr: 43.5		GPA: 3.483	

(continued in next column)

COURSE			ATT	COM	GRADE	POINTS
LAW-FALL SEMESTER 2021-22						
LAW	215	ANTITRUST LAW	3.0	3.0	B+	9.99
LAW	407	SKILLS IMMERSION - LITIGATION	2.0	2.0	P	0.00
LAW	417P	STATUTORY INTERPRETATION PRAC	4.0	4.0	A-	14.68
LAW	439	FEDERAL WHITE COLLAR CRIME	3.0	3.0	A	12.00
LAW	534	JUDICIAL EXTERNSHIP - FEDERAL	2.0	2.0	B+	6.66
LAW	534F	JUDICIAL EXTERN: FED-FD.PLCMT	2.0	2.0	P	0.00
Term	Cmpl Cr: 16.0	GPA Pts: 43.33	GPA Cr: 12.0		GPA: 3.611	
Cumul	Cmpl Cr: 76.0	GPA Pts: 194.82	GPA Cr: 55.5		GPA: 3.510	
LAW-SPRING SEMESTER 2021-22						
LAW	204P	ADV FED PROC:ENVIRON LIT PRACT	3.0	3.0	A-	11.01
LAW	293	FED INCOME TAX OF INDIVIDUALS	3.0	3.0	P	0.00
LAW	310	INDEPENDENT RESEARCH	2.0	2.0	CR	0.00
LAW	534	JUDICIAL EXTERNSHIP - FEDERAL	2.0	2.0	B	6.00
LAW	534F	JUDICIAL EXTERN: FED-FD.PLCMT	2.0	2.0	P	0.00
Term	Cmpl Cr: 12.0	GPA Pts: 17.01	GPA Cr: 5.0		GPA: 3.402	
Year	Cmpl Cr: 28.0	GPA Pts: 60.34	GPA Cr: 17.0		GPA: 3.549	
Cumul	Cmpl Cr: 88.0	GPA Pts: 211.83	GPA Cr: 60.5		GPA: 3.501	

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LAW-SPRING SEMESTER 2021-22 GRADUATION
JURIS DOCTOR 05/13/2022

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Cumul Cmpl Cr: 88.0 GPA Pts: 211.83 GPA Cr: 60.5 GPA: 3.501

***** END OF TRANSCRIPT *****

Registrar

WASHINGTON AND LEE UNIVERSITY
SCHOOL OF LAW
LEXINGTON, VA 24450

June 22, 2023

The Honorable P. Casey Pitts
Robert F. Peckham Federal Building & United States Courthouse
280 South 1st Street, Room 2112
San Jose, CA 95113

Dear Judge Pitts:

I most enthusiastically recommend Josh Clardy for a judicial clerkship. Josh was not only an extraordinary student—one of the most talented and gifted advocates that I have had the pleasure to teach or work with—but a great person. As background, I have had Josh as a student in my statutory interpretation practicum. I also had the privilege to surprise an independent student project that was designed around Wooden v. United States, No. 20–5279 (U.S. March 7, 2022).

In my statutory interpretation practicum, Josh was always prepared—his contributions in class were always welcomed and on point. Josh made our class significantly better. This is especially true when we discussed the best approaches to statutory interpretation. Josh always reminded our class that the right approach should always be concerned with the most just outcome. For example, our class discussed United States v. Marshall, 908 F.2d 1312 (7th Cir. 1990), a case involving an interpretive question of whether paper containing lysergic acid diethylamide ("LSD") crystals is a "mixture" within the meaning of the mandatory sentencing statute. Josh, concerned that the weight of the paper would trigger a significant mandatory minimum sentence, argued that paper should not be included as a "mixture" based on the statute's plain meaning and structure, and that the doctrine of constitutional avoidance counseled against inclusion. Josh was deeply troubled that, under the majority's decision, a person could receive a mandatory minimum sentence of ten years for selling $2.00 worth of LSD. What was most impressive about Josh's analysis was his understanding that—in the end—someone's liberty interest is at stake. That fundamental right is often overlooked especially when reviewing draconian sentencing regimes. Regimes, as Josh is acutely aware, are a criminal justice domain in which inequalities abound—and in ways that raise profound questions about fairness, due process, and justice. In addition, Josh has also demonstrated incredible skills in his written and oral advocacy. For the final project in my statutory interpretation practicum, I required that each student draft a twenty-page brief on an issue concerning whether necrophilia is criminalized under Wisconsin's third-degree sexual assault statute. Josh's brief was well researched, presented cogent arguments, and persuasive. His writing is, without question, in a league of its own. Moreover, Josh's oral advocacy is top-notch and better than many practicing appellate advocates. All of this is to say, Josh received the second highest overall grade in my statutory interpretation course.

Perhaps his greatest work was the draft brief he wrote—and is his writing sample attached to his clerkship application—for a project that I created around the Supreme Court case Wooden v. United States. A quick summary. Before Wooden was decided, I had Josh draft a brief based solely on the appellate record. Josh was also able to use all interpretive tools, including, among other things, dictionaries, decisional law, and statutory frameworks. He conducted all the research and drafted his brief on his own. That brief is absolutely fantastic. It is as good as, if not better than, any brief filed—substantively, structurally, and persuasively—in the actual Wooden case. Indeed, Josh's brief tracks brilliantly the majority opinion—and Justice Gorsuch's concurrence. It is truly an excellent piece of writing, indicative of the quality of work he will perform for you as your clerk.

As a former law clerk to two judges—the Honorable Roger L. Gregory (4th Cir.) and the Honorable Emmet G. Sullivan (DDC)—I, more than most, understand what is expected of a law clerk: trustworthiness, dependability, and excellence. That is Josh. Josh exudes trustworthiness and reliability—he is a real self-starter with an intuitive grasp for what needs to be done and how. Josh is also a person of integrity, perspective, and balance. Reflective and poised, he is always thinking of how to improve, but he also has the mettle, confidence, and great tenacity to tackle difficult and thorny legal questions. Josh thrives in interpersonal relations, and would mix respectfully with other law clerks and professional staff. I would trust him with any work product, no matter how sensitive, and have the utmost confidence that he would always conduct himself with dignity and discretion. More importantly, in my opinion, Josh's compassion and passion separates him from most—he will work tirelessly to ensure that your bench memorandums are well researched and recommend the right result for the right reasons. That is excellence—excellence that he demonstrated throughout his time at Washington and Lee University School of Law.

In sum, I offer Josh my most enthusiastic and unreserved recommendation. He will be an amazing law clerk. It is my sincere hope that he has the opportunity and privilege to work for you, Judge.

Please feel free to reach out to me at bhasbrouck@wlu.edu or 914-443-1324 should you have any questions.

Sincerely,

Brandon Hasbrouck
Assistant Professor of Law

State Law Library of Montana

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215 North Sanders P.O. Box 203004
Helena, MT 59620-3004

http://courts.mt.gov/library

June 20, 2023

Sent Electronically

Re: Joshua L. Clardy

Dear Judge:

If you want to hire someone with incredible legal "vision" you will pick Josh Clardy from the heap of applicants. I clerked and practiced for six years, worked in academia for eleven years, and I currently serve as the State Law Librarian for Montana, and Josh is the best student that I have taught when it comes to issue-spotting. Josh "sees" legal problems in a richer context than his peers. Your chambers will see many qualified candidates apply for this position. Given his intelligence and work ethic, Josh is in that group. I am not sure that you will see another candidate who matches Josh with respect to his clever mind, kindness, and good humor. I offer you my strongest recommendation on his behalf.

When I worked in academia, I do not teach a doctrinal course but instead focused on the skill-building portion of legal education. As opposed to one large final exam, I conducted the Legal Research course via practice exercises that the students completed inside and outside of class each week, which evolved into a series of simulation research assignments. How do I know that Josh is ready to perform at a high level in chambers? I have witnessed his growth as a researcher and writer.

Josh was an excellent student in my Legal Research course during the 2019-2020 academic year. In preparation for this letter of recommendation, I pulled and reviewed his assignments. In the Fall 2019, he received an A- for his efforts. In the Spring 2020 semester, the school went to a pass/fail system in response to the COVID-19 pandemic. Consequently, Josh received a "pass" in my class. What that word does not indicate is that he produced one of the best research reports in the class. When other students are struggling with where to start, Josh is beginning to

Phone (406)444-3660 E-mail: lawlibcirc@mt.gov Fax (406)444-3603

edit down his memo to the most salient arguments. Frankly, I am envious of Josh's innate ability to start a project and quickly transfer his thoughts to the page.

From 2020 to 2022, Josh served as one of the Law Library's McThenia Research Assistants. That is a program of select research assistants that worked with me on complicated tasks for all faculty members at the W&L School of Law. As a McThenia RA, Josh established himself a premier researcher on a wide range of assignments, including a fascinating examination of how defamation intersects with criminal investigations.

In 2022, Josh completed a judicial externship with Hon. Robert S. Ballou, a Federal Magistrate Judge in Roanoke, VA. During this time, Josh and I had some good conversations about his research process, while not talking about any case specifics. For example, Josh was working on a Loco Parentis case, which required the ability shift his "research vision" from seeing the forest to knowing the trees. In response to this challenge, Josh did a fantastic job of (1) using secondary sources to grasp the legal issue, (2) navigating litigation materials to focus on outcome determinative facts and terms, and then (3) using research tools (*i.e.*, key numbers, searching, annotations, citators, etc.) to find relevant case law on the issue.

While Josh was my student and then one of my research assistants, we had the opportunity to talk at length about good legal research techniques. He is keenly aware of audience, and he structures his research efforts accordingly. He is good at understanding when someone needs context for how he got from point A to point B. He has internalized the cardinal rule of starting in secondary sources. The most exciting thing that I can say about Josh's legal research skills is that they continue to evolve and improve. I have watched him over the years take on more difficult tasks and find success. He is teaching himself how to be a lifelong learner.

When I graduated law school, I was a judicial clerk in the Massachusetts court system. I know that having successful chemistry in chambers is critical for a functioning courtroom. If you invite Josh to join your team, his intelligence and research skills will pay dividends. In addition to being academically successful, Josh displays kindness, wit, and emotional intelligence.

I offer you the strongest recommendation on Josh's behalf. If you have any questions about him, please do not hesitate to contact me.

Respectfully,

Franklin L. Runge
State Law Librarian for Montana
franklin.runge@mt.edu
406.444.1979

JOSHUA L. CLARDY

39 E 9th St. | Indianapolis, IN 46204| (214) 552-3384 | Josh_Clardy@insd.uscourts.gov

WRITING SAMPLE

This writing sample is an Order on a Motion for Leave to File an Amended Answer drafted during my clerkship with the Honorable M. Kendra Klump, Magistrate Judge in the Southern District of Indiana. The Motion at issue presented two questions: (1) whether the Defendants showed good cause acting well after the deadline to amend pleadings should be allowed leave to file an Amended Answer that adds absolute immunity and claim and issue preclusion as affirmative defenses; and (2) whether, even in the absence of good cause, could the Motion still be granted. Plaintiffs argued that the Motion must be denied if good cause cannot be shown. My review of Federal Rule of Civil Procedure 16(b)(4)'s text, history, and purpose, and analysis of Seventh Circuit case law suggested otherwise. I subsequently prepared this Order.

The research, drafting, and analysis presented in this writing sample reflect substantially my work and writing style. The Order is nevertheless the product of collaboration between Judge Klump and myself. As a result, this writing sample contains edits made by Judge Klump.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ERIKA MABES, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 1:21-cv-02062-JRS-MKK
	)	
ANGELA MCFEELEY, *et al.*,	)	
	)	
Defendants.	)	

ORDER

Defendants Angela McFeeley, Natasha Davis, Courtney Oakes, Samantha King, Hannah Lyman, Kristin Miller, Courtney Crowe, and Jaclyn Allemon ("DCS Defendants") have renewed their motion for leave to amend their answer to include three additional affirmative defenses, Dkt. [157]. For the reasons that follow, the renewed motion is **GRANTED**.

I. Background

Although the facts of this case are still developing, to the extent necessary to resolve the present motion they are put forth as follows. Plaintiffs Erika Mabes and Brian Mabes, on behalf of themselves and their minor children, ("Plaintiffs" or "the Mabes"), allege that they were deprived of their Fourth and Fourteenth Amendment rights in a sequence of events that began when the Indiana Department of Child Services ("DCS"), acting in part on advice from a doctor at Riley Hospital for Children, Dr. Shannon Thompson, took custody of the Mabes' children without prior court order. (Dkt. 1). They initiated this Section 1983 litigation on July 19, 2021,

against individual employees with the Indiana Hendricks County Department of Child Services (the "DCS Defendants"), Dr. Thompson ("Defendant Thompson"), and Indiana University Health, Inc.[1] (*Id.*). In late September 2021, the three groups of Defendants filed motions to dismiss in response to the Plaintiffs' Complaint. (Dkt. 26, 28, 31). As relevant to the present motion, the DCS Defendants asserted claim and issue preclusion as grounds for dismissal, (Dkt. 107 at 6), and Defendant Thompson asserted absolute immunity, (*id.* at 16).

On October 5, 2021, the Court approved the parties' agreed-upon case management plan and set a date of December 20, 2021 for amending all pleadings. (Dkt. 39 at 5). On September 22, 2022, the Court ruled on the Defendants' motions to dismiss. (Dkt. 107). As to the claim and issue preclusion grounds, the Court noted that such affirmative defenses should "be raised in a responsive pleading" and declined to dismiss the Plaintiffs' Complaint because "there is simply too little in the pleadings for the Court to determine, at this early stage, whether the DCS Defendants' preclusion defenses have merit." (*Id.* at 7, 9). As for Defendant Thompson's absolute immunity argument, the Court engaged with that ground at length, (*id.* at 22-27), defined its applicability to the case at hand, (*id.* at 26), and even granted Defendant Thompson's invocation of it in part, (*id.* at 27).

The DCS Defendants filed their Answer on October 3, 2022. (Dkt. 108). Defendant Thompson filed her answer on October 10, 2022. (Dkt. 112). Absent, however, from the DCS Defendants' answer were the affirmative defenses of claim

[1] Indiana University Health, Inc. was dismissed as a Defendant on September 22, 2022. (Dkt. 107).

and issue preclusion and absolute immunity. The DCS Defendants then had a change of counsel, with their present counsel appearing on November 29, 2022, (Dkt. 124), and prior counsel withdrawing on December 2, 2022, (Dkt. 128).

On April 14, 2023, the DCS Defendants filed a motion requesting that the Court grant them leave to amend their answer to add three additional affirmative defenses: claim preclusion, issue preclusion, and absolute immunity. (Dkt. 146). Defendants argued that those affirmative defenses related to two key issues in this litigation: "information provided to a court by the DCS Defendants stemming from DCS's assessment (absolute immunity) and an Agreed Entry signed by the Plaintiffs (claim preclusion and issue preclusion)." (Dkt. 151 at 1-2). Both the DCS Defendants' request and Plaintiffs' objection were argued under Rule 15, which governs amendments to pleadings. (*See* Dkt. 146 at 1-2; Dkt. 150 at 1-2). Neither party addressed Rule 16(b)(4)'s good cause standard.

This absence of discussion was problematic because in addition to the motions for deadline extensions filed prior to the Court's order on the motions to dismiss, (Dkt. 89, 105), the Court had granted an unopposed motion for deadlines extensions filed shortly after the Court's order on the motion to dismiss, (Dkt. 114). None of these requested extensions to the CMP included a request to extend the deadline for amending pleadings. (*See* Dkt. 87, 104, 111). And just prior to the DCS Defendants' April 14th motion, on March 29, 2023, Plaintiffs had filed an unopposed request to extend various case management deadlines, which, again, did not include extending the deadline for amending pleadings, (Dkt. 140).

Accordingly, the Court denied the DCS Defendants' April 14th motion without prejudice, finding that, because "neither side addresse[d] diligence in their briefing," the Court could not conclude on the record then before it whether the Defendants had shown good cause under Rule 16(b)(4) for amending their answer after the scheduling order deadline. (Dkt. 156 at 4-5).

Shortly thereafter, the DCS Defendants renewed their request to assert the three affirmative defenses with this present motion, Dkt. [157]. Plaintiffs objected, arguing that the Defendants have failed to demonstrate good cause for amending their answer. (Dkt. 162). Defendants filed a reply on May 12, 2023. (Dkt. 163). The motion is now ripe and ready for ruling.

II. Legal Standard

Rule 15 of the Federal Rules of Civil Procedure governs amendments of pleadings, noting that "a party may amend its pleading only with . . . the court's leave," and courts "should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). Rule 16 of the Federal Rules of Civil Procedure, on the other hand, governs scheduling orders, stating "[a] schedule may be modified only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4). These Rules are to be "construed to provide for the 'just, speedy, and inexpensive determination of every action' on its merits." *Stevo v. Frasor*, 662 F.3d 880, 887 (7th Cir. 2011) (quoting Fed. R. Civ. P. 1).

The Seventh Circuit has acknowledged "some tension" between Rule 15(a)(2) and Rule 16(b)(4). *Alioto v. Town of Lisbon*, 651 F.3d 715, 719 (7th Cir. 2011). The

interplay of these two rules demands that the Court balance both Rule 15's liberal policy that cases should be decided on the merits and not on the basis of technicalities, *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329, 1334 (7th Cir. 1977), and Rule 16's aims "to prevent parties from delaying or procrastinating and to keep the case moving toward trial," *Alioto*, 651 F.3d at 720 (internal quotation marks omitted). As such, motions seeking leave to amend pleadings after the deadline to do so are often analyzed through a so-called "two-step process." *Id*. at 719.

The Seventh Circuit has consistently used discretionary language when describing a court's implementation of the two-step process. *See Cage v. Harper*, 42 F.4th 734, 743 (7th Cir. 2022) ("Given this tension [between Rules 15 and 16], we have held that a district court may 'apply the heightened good-cause standard of Rule 16(b)(4) before considering whether the requirements of Rule 15(a)(2) were satisfied.'") (quoting *Alitoto*, 651 at 719); *Allen v. Brown Advisory, LLC*, 41 F.4th 843, 852 (7th Cir. 2022) ("entitled"); *Alitoto*, 651 F.3d at 719 ("the district court was entitled to apply the heightened good-cause standard of Rule 16(b)(4) before considering whether the requirements of Rule 15(a)(2) were satisfied").[2] Such

[2] The Court acknowledges that the Seventh Circuit at times has described the two-step process in more draconian terms. *E.g.*, *Peters v. Wal-Mart Stores E., LP*, 512 F. App'x 622, 627 (7th Cir. 2013) ("Because the deadline for amending the pleadings had passed more than a year and half earlier, Peters first had to show good cause to modify the scheduling order; only then does the general standard of Rule 15(a)(2) apply."). Until the Seventh Circuit definitely rules otherwise, however, the Court finds it appropriate to exercise *its* discretion in accordance with the discretionary language consistently used by the Seventh Circuit, as the Court finds that this approach reflects and preserves the plain meaning and spirit of Rule 15(a)(2) and Rule 16(b). *See G. Heileman Brewing Co. v. Joseph Oat Corp.*,

discretionary language conforms with the fact that, ultimately, a request to allow a pleading to be amended is addressed to the judge's discretion. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Glover v. Carr*, 949 F.3d 364, 367-68 (7th Cir. 2020).

III. Discussion

The DCS Defendants ask for leave to amend their pleadings after the deadline to do so. (Dkt. 157).

Despite this Court's observation on the discretionary nature of adhering to the "two-step process," the Court will proceed to use the two-step process' well-established structure. The Court does so for two reasons. First, because the Court denied the DCS Defendants initial motion for leave "for a failure to demonstrate good cause under Rule 16(b)(4)," the analysis begins by addressing whether the DCS Defendants' renewed motion made "[an] attempt to demonstrate due diligence in seeking this amendment." (Dkt. 156 at 4). Second, much of Plaintiffs' argument against the DCS Defendants' belated motion indicates they will not face any prejudice from the belated assertion of these affirmative defenses.

A.

In their renewed motion, the DCS Defendants have not provided the Court with what would be considered a demonstration of their diligence in seeking to add these three affirmative defenses. *See Cage*, 42 F.4th at 743 ("In making a Rule 16(b) good-cause determination, the primary consideration for district courts is the

871 F.2d 648, 652 (7th Cir. 1989) ("There is no place in the federal civil procedural system for the proposition that rules having the force of statute, though in derogation of the common law, are to be strictly construed.").

diligence of the party seeking amendment."). A showing of good cause considers not only whether the initial deadline could not have been met, but also the moving party's diligence upon discovery of the facts that serve as the basis for the amendment.

The Court noted in the Order denying the DCS Defendants' initial motion for leave that there was a substantial gap between the DCS Defendants' request for leave and the December 20, 2021 deadline to amend that had been left unexplained. (Dkt. 156 at 4). One possible explanation, offered by neither party, was that the December 20, 2021, deadline was too strict given the DCS Defendants did not file their answer until October 3, 2022, (Dkt. 108), after the Court's resolution of their motion to dismiss. But that is not an argument raised by either party.

Nor could it have realistically been. By the time the parties had proposed the deadline to amend the pleadings on September 28, 2021, the defendants' motions to dismiss had already been filed. The parties' agreed to case management plan was entered on October 5, 2021, setting the deadline to amend the pleadings as December 20, 2021. (Dkt. 39). By the time the DCS Defendants' motion to dismiss became ripe, on November 22, 2021, (Dkt. 64), the agreed deadline to amend the pleadings that they had not yet filed was less than a month away. The Seventh Circuit has observed in this situation that the defendants "could and should have moved for an extension if they wished to preserve the opportunity for further amendments after the court rendered its decision." *Adams v. City of Indianapolis*, 742 F.3d 720, 734 (7th Cir. 2014). The parties routinely sought, and the court

granted, extensions of the discovery deadlines that they had agreed to in the case management plan. (Dkt. 89, 105, 105, 114, 143). Not once did the parties seek to adjust the deadline to amend the pleadings. So, as the Seventh Circuit recently put it, "it is reasonable to conclude that a [party] is not diligent when he in silence watches a deadline pass even though he has good reason to tact or seek an extension of the deadline." *Allen*, 41 F.4th at 853.

The Court acknowledges that the DCS Defendants' answer was filed by prior counsel and this request is being made by counsel that appeared nearly two months after the Answer had been filed. (*See* Dkt. 108, 124). But even if the Court were to find this change in counsel relevant to the good cause showing, an adequate explanation has not been given as to why it took from November 29, 2022 (DCS Defendants' new counsel's appearance) until April 14, 2023 (DCS Defendants' initial motion for leave) or May 1, 2023 (DCS Defendants' renewed motion for leave) for the DCS Defendants to seek leave to add three rather significant affirmative defenses to their answer. Especially, when such defenses had been squarely raised and addressed in the Court's Order on the motions to dismiss.

Instead, the DCS Defendants present the following explanation in this renewed motion for leave: "[a]lthough Plaintiffs' Complaint arguably provides some factual basis for asserting these defenses, the discovery depositions in this case have enhanced and clarified Plaintiffs' claims related to DCS Defendants' proposed affirmative defenses." (Dkt. 163 at 2). Of course, the Seventh Circuit has long acknowledged that "it is not unusual for parties to discovery new theories for claims

or defenses in the course of discovery." *Reed v. Columbia St. Mary's Hospital*, 915 F.3d 473, 479 (7th Cir. 2019); *see also Burton v. Ghosh*, 961 F.3d 960, 965 (7th Cir. 2020) ("This will often be the case where the basis for the defense is disclosed through discovery."); *Venters v. City of Delphi*, 123 F.3d 956, 967 (7th Cir. 1997) ("The pertinence of a particular defense may only become apparent after discovery, for example, in which case it would be reasonable for the court to permit the belated assertion of that defense."). But the DCS Defendants' explanation here is that discovery "*enhanced and clarified* Plaintiffs' claims related to DCS Defendants' proposed affirmative defenses," (Dkt. 163 at 2 (emphasis added)), not that discovery revealed "the basis" to assert these additional affirmative defenses, *Burton*, 961 F.3d at 965. This explanation appears to suggest that the DCS Defendants knew that Plaintiffs' claims touched on the affirmative defenses it now seeks to add, but the DCS Defendants waited for Plaintiffs to depose the DCS Defendants and for the DCS Defendants to depose the Plaintiffs. The DCS Defendants' decision to delay amending their answer until they confirmed their suspicions does not establish good cause. *See Trustmark Ins. Co. v. Gen. & Cologne Life Re of Am.*, 424 F.3d 542, 553 (7th Cir. 2005) (waiting to confirm "suspicions" is not indicative of diligence).

Pointing to recent depositions (that occurred March 10, 2023, March 17, 2023, and April 17, 2023) as "good cause" to justify the delay in seeking to add affirmative defenses is problematic. This is because this justification seems to run contrary to the DCS Defendants' September 2021 attempt to raise claim and issue preclusion as grounds for dismissal, (Dkt. 26), the DCS Defendants' position on their initial motion

for leave that "[t]hese issues have been at the forefront of this litigation," (Dkt. 151 at 2), and the DCS Defendants' concession in its renewed motion that "Plaintiffs' Complaint arguably provides some factual basis for asserting these defenses," (Dkt. 163 at 2). *See* Fed. R. Civ. P. 11(b); *Venters*, 123 F.3d at 968 ("Once the availability of an affirmative defense is reasonably apparent, … [t]he appropriate thing for the defendant to do, of course, is to promptly seek the court's leave to amend his answer. His failure to do risks a finding that he has waived the defense.") (internal citations omitted).

Ultimately, the DCS Defendants are not pointing to those depositions as "good cause" to justify their delay in seeking to add these amendments. Instead, they point to those depositions as indicating that they have "good cause to raise the absolute immunity defense" and "good cause to raise the issue preclusion/claim preclusion defense." (Dkt. 157 at 3, 4). The question of "good cause" under Rule 16(b), however, is not tied to whether the party has good cause to raise a particular defense. Generally speaking, Rule 16(b)(4) is looking for a "good excuse for [the party's] untimeliness." *Allen*, 41 F.4th at 853. An explanation as to *why* the party wants to add the claim or defense does not demonstrate "the diligence of the party seeking to amend." *Id*. at 852-53.

The Court emphasizes the DCS Defendants' failure to provide "good cause" to make clear the following point: it is only because "justice so requires" and "to secure the just, speedy, and inexpensive determination of [this] action" that the Court exercises its discretion and grants the DCS Defendants' motion. Fed. R. Civ. P.

15(a)(2) & Fed. R. Civ. P. 1.

B.

The Court now turns to Rule 15: do the interests of justice weigh in favor of granting the motion? Here, of course, the DCS Defendants are seeking to add absolute immunity, claim preclusion, and issue preclusion as affirmative defenses to their answer. (Dkt. 157). Federal Rule of Civil Procedure 8(c) requires that affirmative defenses must be included as part of the answer. Absolute immunity, claim preclusion, and issue preclusion are affirmative defenses that must be affirmatively stated in the answer. *Tully v. Barada*, 599 F.3d 591, 593-94 (7th Cir. 2010) (characterizing absolute immunity as an affirmative defense); *Adair v. Sherman*, 230 F.3d 890, 894 (7th Cir. 2000) ("Issue preclusion is an affirmative defense."); *Taylor v. Sturgell*, 553 U.S. 880, 907 (2008) ("Claim preclusion, like issue preclusion, is an affirmative defense."). Pleadings can be amended, and Rule 15 provides that, when a party seeks leave to amend a pleading, the "court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2); *Burton v. Ghosh*, 961 F.3d 960, 962 (7th Cir. 2020) ("Federal Rules of Civil Procedure 8(c) and 15 . . . govern the raising of new affirmative defenses."). "As a rule," courts "have allowed defendants to amend when the plaintiff had adequate notice that [an affirmative defense] was available, and had an adequate opportunity to respond to it despite the defendant's tardy assertion." *Jackson v. Rockford Housing Authority*, 213 F.3d 389, 393 (7th Cir. 2000).

The Seventh Circuit has instructed that courts "must be alert to the real and

practical harms that can result from failures to plead." *Reed v. Columbia St. Mary's Hosp.*, 915 F.3d 473, 478 (7th Cir. 2019). But the Court "may, however, exercise its discretion to allow a late affirmative defense if the plaintiff does not suffer prejudice from the delay." *Burton*, 961 F.3d at 965 (citing, in part, Fed. R. Civ. P. 15(a)(2)). Here, Plaintiffs do not suffer prejudice from the DCS Defendants' delay, and the interests of justice strongly favor granting the DCS Defendants' request.

Plaintiffs make two principal assertions as to how they would be prejudiced by these proposed affirmative defenses. First, the Plaintiffs claim that this "attempt to allege these affirmative defenses at this late stage deprives Plaintiff of the ability to fully develop their case against these affirmative defenses." (Dkt. 162 at 5). Second, Plaintiffs contend that the "DCS Defendants' decision to wait until [their depositions of the DCS Defendants] were complete to raise this issue unduly prejudices" them. (Dkt. 162 at 5). Neither assertion of prejudice, however, is particularly persuasive.

The Seventh Circuit in *Burton* explained that "unfair prejudice" means "that the late assertion of the defense causes some unfairness independent of the potential merits of the defense." 961 F.3d at 966; *see also Global Technology & Trading, Inc. v. Tech Mahindra Ltd.*, 789 F.3d 730, 732 (7th Cir. 2015) (defining "prejudice" as "a reduction in the plaintiff's ability to meet the defense on the merits"). This unfairness may be come from "the timing depriv[ing] her of notice and the opportunity to prepare to meet the defense through discovery." *Burton*, 961 F.3d at 966 (citing *Reed*, 915 F.3d at 482). Or the unfairness could stem from a "more

procedural form of prejudice: the *way* the defense was raised harmed the plaintiff by impairing her ability to respond effectively." *Id*. (citing *Venters*, 123 F.3d at 969).

Here, seeking leave to raise these affirmative defenses, while undoubtedly untimely, has not occurred without adequate notice. Nor does it deprive Plaintiffs' ability to meet them on the merits.

Plaintiffs' Motion for Summary Judgment deadline is June 20, 2023. (Dkt. 143). According to Plaintiffs, "the parties have been engaged in discovery in this case since February 2022." (Dkt. 162 at 5). And as both the Plaintiffs and the DCS Defendants point out, though with different emphasis, discovery is still open in this case, with the deadline for non-expert and liability discovery being July 20, 2023. (Dkt. 157 at 5; Dkt. 162 at 5). While these deadlines may be approaching, the Plaintiffs have made no argument beyond mere assertion as to what "written discovery related to these defenses" would be sprung upon them at this time. (Dkt. 162 at 5). Nor is the Court certain what additional discovery would be necessary when absolute immunity, claim preclusion, and issue preclusion are predominantly questions of law. In one form or another, these affirmative defenses have been at the forefront of this case since the defendants filed their motions to dismiss in September 2021. For at least claim and issue preclusion, it has been known since the DCS Defendants filed their motion to dismiss that they intended on raising claim and issue preclusion against Plaintiffs' claims. The DCS Defendants even went so far as to advantageously attach "an exhibit purporting to show the existence of a previous suit" to their motion to dismiss that Plaintiffs successfully had

stricken. (Dkt. 107 at 8 (citing Dkts. 30 & 86)). And Plaintiffs admit that an absolute immunity affirmative defense was the "understood . . . import of [their] allegations." (Dkt. 162 at 3).

That the DCS Defendants filed their answer and failed to assert the affirmative defenses they now seek leave to add does not mean Plaintiffs lacked sufficient notice that the DCS Defendants might pursue these defenses. *See Blaney v. United States*, 34 F.3d 509, 513 (7th Cir. 1994) (defenses raised in motions to dismiss may provide sufficient notice); *Robinson v. Sappington*, 351 F.3d 317, 332-33 (7th Cir. 2003) (topics of discovery may indicate plaintiff's sufficient notice affirmative defenses may be pursued).

For many of the same reasons that Plaintiffs argued the DCS Defendants did not demonstrate good cause for their delay in seeking to add these affirmative defenses, (*see* Dkt. 162 at 3-5), it is clear that Plaintiffs "had adequate notice" that the affirmative defenses "[were] available," and have "adequate opportunity to respond to [them] despite the defendant[s'] tardy assertion." *Jackson*, 213 F.3d at 393. Allowing the DCS Defendants leave to amend their answer does not substantively or procedurally prejudice Plaintiffs.

The Court sees the greater risk of prejudice befalls the DCS Defendants instead. *See* 6 Wright & Miller, *Federal Practice and Procedure* § 1487 (3d ed.) (updated Apr. 2023). ("In order to reach a decision on whether prejudice will occur that should preclude granting an amendment, the court will consider the position of both parties and the effect the request will have on them."). As the Plaintiffs point

out, "the DCS Defendants knew of these potential affirmative defenses when they filed their answer and chose not to assert them." (Dkt. 162 at 4). Courts are to likely find that affirmative defense have been "waived when it has been knowingly and intelligently relinquished and forfeited when the defendant has failed to preserve the defense by pleading it." *Burton*, 961 F.3d at 965 (citing *Reed*, 915 F.3d at 478). To not allow the DCS Defendants the opportunity present potentially viable defenses against the Plaintiffs claims seems to only prejudice the DCS Defendants.

Rule 15(a)(2) instructs that "[t]he court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). And Rule 1 provides how the plain language of that instruction is to be "construed, administered, and employed." Fed. R. Civ. P. 1. "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and affect the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Woods v. Indiana Univ.-Purdue Univ. at Indianapolis*, 996 F.2d 880, 884 (7th Cir. 1993).

The "spirit and inclination of the rule favor[s] decisions on the merits." *Schiavone v. Fortune*, 477 U.S. 21, 27 (1986). Here, the DCS Defendants should be granted leave because "justice so requires." Fed. R. Civ. P. 15(a)(c).

IV. Conclusion

For the foregoing reasons, the Court hereby **GRANTS** DCS Defendants' Renewed Motion for Leave to File Amended Answer and Affirmative Defenses, Dkt. [157]. The DCS Defendants are to file their Amended Answer and Affirmative Defenses (Dkt. 157-1) within four (4) days of this Order.

So ORDERED.

Distribution:

All ECF-registered counsel of record via email

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WRITING SAMPLE

This writing sample is a portion of a Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction, drafted as an assignment for my Advanced Federal Procedure, Environmental Law Practicum during the Spring 2022 semester of law school. The assignment required composing and arguing only the irreparable harm prong of the preliminary injunction analysis in the Argument section of a motion filed to the Western District of Virginia and advocating and defending that position in an oral argument before the practicum professor, Professor Derek Teaney. This sample addresses the irreparable harm prong in two ways. First, with a threshold jurisdictional question of Article III standing when a pipeline company attempts to claim irreparable harm arising exclusively from obligations and speculations distinct and detached from the landowners the pipeline company seeks immediate possession of property from. Second, with an analysis of why the binding precedent is no longer the governing authority for irreparable harm.

All the facts, with some variation, for the assignment were derived from the transcripts of testimony by the pipeline's witnesses made at various hearings of actual cases heard, and ruled upon, by the Northern District of West Virginia, Southern District of West Virginia, and Western District of Virginia. For purposes of this sample, a brief abstract of the facts has been included. The sample is unedited by any third party.

Background Facts

Mountain Valley Pipeline, LLC (MVP) was formed to build a 303-mile gas pipeline. The Federal Energy Regulatory Commission (FERC) approved the proposed pipeline and granted MVP a Certificate of Public Convenience and Necessity (FERC Certificate) on October 13, 2017. On October 24, MVP commenced a condemnation action against 297 parcels of land; three days later MVP filed motions for a partial summary judgment and a preliminary injunction under East Tennessee Natural Gas Co. v. Sage, 361 F.3d 808 (4th Cir. 2004). For the preliminary injunction motion MVP seeks from immediate possession of the defendants' land to begin construction. MVP relies extensively on and tailors its evidence to the reasoning put forth by the oft-cited Fourth Circuit Sage decision. Although the pipeline company has yet to receive either a 401 or 404 Certificate to begin construction of the pipeline, MVP has provided testimony and documents to claim it will suffer irreparable harm absent a preliminary injunction in various forms of economic and non-economic harm. The economic harms amount to over eight hundred million dollars stemming from delays in revenue, contractual penalties agreed upon with construction companies prior to FERC's issuance of a FERC Certificate, and the administrative costs of maintaining its staff and materials for an additional year, should it not obtain an injunction. As for the non-economic harms, MVP feared any delays would damage to its reputation as a pipeline company and result in MVP missing their planned in-service date and the FERC Certificate's three-year in-service deadline.

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ARGUMENT

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II. MVP CANNOT SHOW IRREPARABLE HARM

But an injunction "does not follow from success on the merits as a matter of course." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008). It is "a matter of equitable discretion." *Id.* MVP claims a lack of immediate access to the Landowners' property would result in several different forms of economic injury. N.D. W. Va. Tr. 116:5-25 (delays in revenue); S.D. W. Va. Tr. 55-56; J.A. 3129-31 (contractual penalties); W.D. Va. Tr. 204-08 (administrative costs). Non-economic injuries too. N.D. W. Va. Tr. 123:11-25, 124:1-4 (reputation and goodwill); W.D. Va. Tr. 213 (missing FERC in-service deadline). But "[e]quitable intervening rights," as has been said elsewhere, "are not meant as a redress for bad business decisions." *Bendix Com. Vehicle Sys., LLC v. Haldex Brake Prod. Corp.*, No. 1:09-CV-176, 2011 WL 55969, at *1 n.2 (N.D. Ohio Jan. 3, 2011).

A preliminary injunction is "an extraordinary remedy." *Leaders of a Beautiful Struggle v. Balt. Police Dep't*, 2 F.4th 330, 339 (4th Cir. 2021) (en banc). Like the other three prongs, only "a clear showing" of irreparable harm entitles MVP to such a remedy. *Winter*, 555 U.S. at 22. Such "extraordinary remedy" is "never awarded as of right." *Id*. at 24. Pointing to big numbers, "however substantial," and calling them harm is "not enough." *Sampson v. Murray*, 415 U.S. 61, 90 (1974) (quotations omitted). The "harm" must be "irreparable." *Hughes Network Sys. v. Interdigital Communications Corp.*, 17 F.3d 691, 694 (4th Cir. 1991). MVP points to delays costing money and jeopardizing reputation, calls it "harm," and asks this Court to do something about it.

A. MVP Lacks Standing For A Preliminary Injunction Against the Landowners

Before MVP can claim any injury "irreparable," there must first be standing. MVP has "the burden to 'demonstrate standing for each claim'" and "'for each form of relief' sought." *Outdoor Amusement Bus. Ass'n v. Dep't of Homeland Sec.*, 983 F.3d 671, 680 (4th Cir. 2020) (quoting *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008)); *see TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021) ("[F]or example, injunctive relief and damages."). Only "when there is 'real or immediate threat' that the party will suffer an injury in the future" does "[a] plaintiff ha[ve] standing to sue for injunctive relief." *Griffin v. Dep't of Labor Fed. Credit Union*, 912 F.3d 649, 655 (4th Cir. 2019) (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983)). The rigor of the required demonstration corresponds "with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). It's not enough to take MVP at its word; this court must apply an "even more searching" standard of review, demanding MVP show a substantial likelihood of standing. *Pashby v. Delia*, 709 F.3d 307, 319 (4th Cir. 2013); *Electronic Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity*, 878 F.3d 371, 377 (D.C. Cir. 2017) ("In the context of a preliminary injunction motion, the plaintiff must show a substantial

likelihood of standing under the heightened standard for evaluating a motion for summary judgment." (internal quotations omitted)). But that injury must be "palpable and imminent," *South Carolina v. United States*, 912 F.3d 720, 726 (4th Cir. 2019); cannot be "manufacture[d]," *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013); and requires more than "speculative" redressability to the alleged injury with a favorable decision, *Friends of the Earth, Inc. v. Laidlaw Env't Servs., Inc.*, 528 U.S. 167, 181 (2000).

1. "Harm" Too Speculative Does Not Establish Standing

"[N]ot all threatened injuries constitute an injury-in-fact." *South Carolina*, 912 F.3d at 726 (quotation and citation omitted). Article III "injury-in-fact" requires "establish[ing] a 'realistic danger of sustaining a direct injury.'" *Id.* (quoting *Peterson v. Nat'l Telcoms. & Info. Admin.*, 478 F.3d 626, 632 (4th Cir. 2007)). "[T]o serve as the basis for standing in a suit for injunctive relief," the "injury should be 'certainly impending.'" *Griffin*, 912 F.3d at 655 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)). This requirement that the injury-in-fact "be palpable and imminent ensures that the injury 'is not too speculative for Article III purposes.'" *South Carolina*, 912, F.3d at 726 (quoting *Lujan*, 504 U.S. at 564–65 n.2). Yet the injuries MVP claims supports grounds for an injunction—reputational and financial injuries—are "too speculative for Article III purposes." *Id.*

Out of the gate, the non-economic injuries MVP points to seem dubious for standing purposes. The FERC certificate lasts 3 years. MVP admits it is not at risk of exceeding that 3-year window if property is not allowed before March 20XY.* W.D. Va. Tr. 213-17 (providing alternative schedules indicating completion is very possible before

* [Note]. As a matter of convenience and simplicity, when it comes to denoting the timing and dates of events for purposes of this motion, the months and days will remain the same and align with the facts of the case, such as the hypothetical submission of this motion being in February 15. The years will be represented by 20XX to indicate the year the case was filed (opposed to using 2017); 20XY to indicate the current year (opposed to using 2018 or 2022); and 20XZ to indicate the subsequent year. Years before 2017 (20XX) will be denoted by working backwards through the alphabet from 'X'.

the FERC certificate expires); *see* J.A. 3344, 3345 (same). Accordingly, the MVP's alleged reputational injury suffers from being "conjectural or hypothetical." *Mirant Potomac River, LLC v. EPA*, 577 F.3d 223, 226 (4th Cir. 2009) (quotation and citation omitted). Neither injury will be realized if MVP must wait a little longer until it can access the property. Because MVP can wait, this Court cannot describe MVP's non-economic injuries as "certainly impending." *Griffin*, 912 F.3d at 655. And MVP cannot stand on such injuries for injunctive relief. *Id*.

The "loss" in revenue stands on similarly shaky ground. Mountain Valley Pipeline, LLC has signed Precedent Agreements (Agreement) with the five companies that formed the LLC. J.A. 2748, 2751-52.[1] The Agreements were entered before FERC issued the certificate. J.A. 2751. The Agreement lasts 20 years from the whenever MVP is able to "render service to" MVP's member companies. J.A. 2892. Unlike the situation in *Sage*, which MVP relies heavily upon, where the pipeline company faced the expiration of its FERC certificate, 361 F.3d at 829, MVP faces an "anticipated service date" of November 1, 20XY. J.A. 2892. A delay that does not affect the 20-year agreement. S.D. W. Va. Tr. 52:6-25. To claim, as MVP's Cooper does, that a delay would be "taking that amount of money out of [MVP's] pockets in 20XY," *id*, does nothing to suggest "imminent" harm. These Agreements were entered in 20XU and 20XV. J.A. 2751-52 (FERC Certificate listing 20XU and 20XV); J.A. 2889 (Precedent Agreement first entered October 21, 20XU). MVP has yet to earn any revenue and it has no "imminent" risk of earning any less revenue. The delay is not "palpable" either. *See* J.A. 2896 ("[MVP] shall not be liable in any many to [it's parent companies] due to [MVP]'s failure to complete the construction

[1] Those precedent agreements contain a 'Most Favored Nations' clause, *see* J.A. 2894, which in other circumstances could be anticompetitive. *See Connell Const. Co. v. Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616 (1975) (finding "most favored nations" clause produced anticompetitive effects to not be entitled to antitrust exemption). But here, MVP and its five parent companies are viewed as "a single entity." *Texaco, Inc. v. Dagher*, 547 U.S. 1, 6 (2006). Though mentioned by FERC in the Notice and Comments as irrelevant for granting the FERC Certificate, this Court owes no deference to allowing "a single entity" to have standing for injuries caused by contractual obligations entered into with itself.

of the Project within the timeframe contemplated herein."). As "the Supreme Court has 'emphasized repeatedly,' an injury-in-fact 'must be concrete in both a qualitative and temporal sense.'" *Beck v. McDonald*, 848 F.3d 262, 271 (4th Cir. 2017) (quoting *Whitmore*, 495 U.S. at 155). This injury is neither.

The claimed "administrative" or "carrying" costs are just as "speculative." *South Carolina*, 912 F.3d at 727. MVP worries that any delays will produce tangible injury due to equipment fees, reservation fees, maintenance fees accrued during the forced inactivity. *See* W.D. Va. Tr. 204-08. But that dollar amount MVP points to, Cooper admits, "is a forecast, a placeholder in the budget," "not a specific accounting." W.D. Va. Tr. 206:14-19. Such a "conjectural" injury is not sufficient for standing purposes. *Mirant Potomac River,* 577 F.3d at 226; Black's Law Dictionary (11th ed. 2019) (defining "conjecture" to mean "[a] guess").

2. "Harm" Self-Inflicted Cannot Establish Standing

At the end of the day, FERC "vest[ed]" MVP "with the federal eminent domain power." *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244, 2253 (2021). As the Fourth Circuit has pointed out, and MVP seeks to stress, "possession" of the property "is simply a timing" issue. *E. Tenn. Nat. Gas Co. v. Sage*, 361 F.3d 808, 829 (4th Cir. 2004). But that does not give MVP standing to "be heard to complain about damage inflicted by its own hand." *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976). MVP "cannot manufacture standing merely by inflicting harm on [itself] based on [its] fears of hypothetical future harm." *Clapper*, 568 U.S. at 416; *see Petro-Chem Processing, Inc. v. EPA*, 866 F.2d 433, 438 (D.C. Cir. 1989) (Ginsburg, R.B., J.) (self-inflicted injury does not support standing if it is "so completely due to the [complainant's] own fault as to break the causal chain") (quoting 13 C. Wright, A. Miller & E. Cooper, *Fed. Practice & Procedure: Jurisdiction 2d* § 3531.5 (2d ed. 1984)). Any and all injury MVP claims arises from its decision to approach constructing a pipeline the way it has, not from any role the Landowners have played.

The Supreme Court's decision in *Clapper* is on point here. The tension in *Clapper* stood between Congress relaxing notice requirements when the Government wishes to conduct surveillance against certain persons and the attorneys representing such persons. 568 U.S. at 401. In response to this statute, several attorneys claimed to be "forced…to take costly and burdensome measures to protect the confidentiality of their" communications. *Id.* The Second Circuit panel had concluded that the attorneys had "already suffer[ed]…ongoing injuries," so the panel viewed "the likelihood of interception under § 1881a" to be "relevant only to the question whether [the attorneys'] ongoing injuries [were] 'fairly traceable' to § 1881(a)." *Id.* at 415. The Second Circuit held, under a "reasonableness standard," that the attorneys had "established that they suffered *present* injuries in fact—economic and professional harm—stemming from a reasonable fear of *future* harmful government conduct." *Id.* at 415-16. The Supreme Court rejected this "water[ed] down" analysis. *Id.* at 416.

"Incurr[ing] certain costs as a reasonable reaction to a risk of harm," the Supreme Court said, "is unavailing—because the harm [the attorneys] seek to avoid is not certainly impending." *Id.* "Article III standing" the Court held, "cannot [be] manufacture[d]…by incurring costs in anticipation of non-imminent harm." *Id.* at 422. This is exactly what MVP attempts to do by pointing to "harm" arising from these construction contracts and Agreements. *See* J.A. 3129-31 (contractual delay fees); J.A. 2889-93 (agreed service revenue).

These contracts that MVP entered with the construction companies and Agreements with the five companies that serve both as MVP's parent companies and sole customers are unrelated to the possession of the Landowners' property. Forming MVP for the purpose to construct a pipeline may have been necessary to secure a FERC Certificate; entering into precedent agreements to secure revenue may have useful to secure a FERC Certificate; entering into retainer contracts with pipeline contractors may have helped secure the FERC Certificate. *See* W.D. Va. Tr. 227:1-18 (Cooper testifying

construction contracts entered prior to seeking any condemnation). But the "enterprising plaintiff" – here, one that agrees to incur millions upon millions of dollars in fees, *see* J.A. 3129-31 – is foreclosed from "secur[ing] a lower standard of Article III standing simply by making an expenditure based on," *Clapper*, 568 U.S. at 416, its "self-inflicted" decisions. *Pennsylvania*, 426 U.S. at 664.

Nor can MVP's decision to file suit against 300 Landowners at once create "standing." That the condemnation hearings may take longer than the 3-years granted by the FERC Certificate is not an "injury" caused by the Landowners. In all likelihood, as MVP had Mr. Samuel Long testify to, any delay can be traced to MVP waiting until December 20XX to make an attempt at producing a number for just compensation. W.D. Va. Tr. 287:14-16 (testifying that time restraints warranted novel just compensation appraisal methods, unrecognized and contrary to common practice). That some Landowners found the compensation MVP proffered based on suspicious and conjectural methods lacking did not create an "injury" to MVP. *Cf. Diamond v. Charles*, 476 U.S. 54, 62 (1986) ("The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements."). Although the Fifth Amendment allows for takings to occur prior to the payment of just compensation, the "enterprising plaintiff" does not "secure a lower standard of Article III standing" by claiming "harm" in order to engage in such taking.

3. Nor Will the "Harm" be Redressed

A ruling in MVP's favor does not "likely" resolve the problem. *Laidlaw*, 528 U.S. at 181. Without "causation" and "redressability" the injury MVP brings does not establish standing. *See Frank Krasner Enters. Ltd. v. Montgomery County*, 401 F.3d 230, 234-35 (4th Cir. 2005) (citation omitted). MVP seeks to gain immediate access to the Landowners' property because it faces a March 20XY deadline. W.D. Va. Tr. 213. "An injury sufficient to meet…the standing inquiry must result from the actions of the

respondent, not from the actions beyond the Court's control." *Mirant Potomac River*, 577 F.3d at 226.

To point to contracts, J.A. 3129-31, or precedent agreements, J.A. 2889-93, in which the Landowners are not parties does not alleviate, even marginally, any "harm" by this Court. *Cf. E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) ("It goes without saying that a contract cannot bind a nonparty."). Certainly, removing marginal obstacles could be sufficiently redressable. *See Deal v. Mercer Cnty. Bd. of Educ.*, 911 F.3d 183, 190 (4th Cir. 2018). Yet the Fourth Circuit has recognized that "redressability" becomes "'problematic when third persons not party to the litigation must act in order for an injury to arise or be cured.'" *Disability Rts. S. C. v. McMaster*, 24 F.4th 893, 903 (4th Cir. 2022) (quoting *Doe v. Va. Dep't of State Police*, 713 F.3d 745, 755 (4th Cir. 2013). Such is the case here. The Landowners are not responsible for any "harm" that may arise from the contracts and agreements MVP points to. Any such "harm" stems exclusively from the actions of parties not present before the court.

But even with the Court's permission, MVP lacks a 401 and 404 Certificate. Such a "certification…is 'required' from a state prior to [any] [discharge] activities." *Sierra Club v. United States Army Corps of Eng'rs*, 981 F.3d 251, 261 (4th Cir. 2020). Assuming MVP encounters protected waters – a fact MVP admits it does not know whether its FERC-approved pipeline will encounter, S.D. W. Va. Tr. 34:11-25 – MVP would be in the same place it stands now. Especially, when the FERC Order required MVP "must obtain all necessary federal and state permits and authorizations, including water quality certifications, prior to receiving Commission authorization to commence construction." J.A. 2816. Relief that "rest[s] upon contingent future events that may not occur as anticipated, or indeed may not occur at all," cannot be redressed by this Court. *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal quotation marks omitted).

MVP attempts to point to delays costing money and reputation and call them "harm." But injury too speculative, manufactured, or unredressable does not establish

standing. This Court cannot do something about it no matter how many times MVP tries to say its been "harmed."

B. MVP Has Not Shown Harm Clearly "Irreparable."

But even if MVP were to have standing to seek injunctive relief, none of the harm to which it points is "irreparable." As an "equitable remedy," an injunction is not "issue[d] as of course, or to restrain an act the injurious consequences of which are merely trifling." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (internal quotations and citations omitted). Economic harm can be the basis for irreparable harm if unrecoverable. *Cf. Hughes Network Sys.*, 17 F.3d at 694. MVP places all its faith in *Sage* to convince the Court it has suffered irreparably.

1. *Sage* Has Since Been Undermined

The Fourth Circuit's decision in *East Tennessee Natural Gas Co. v. Sage* does not tie this Court's hands in the way MVP portrays. In three ways, the "underpinnings" of the irreparable harm analysis in *Sage* have been "eroded[] by subsequent decisions of [the Supreme Court]." *United States v. Gaudin*, 515 U.S. 506, 521 (1995).

First. The Supreme Court's decision in *Winter* clarified the standard for preliminary injunction. *See Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 345-47 (4th Cir. 2009) (recognizing *Winter* overruled the "balancing-of-hardship" test put forth by *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189 (4th Cir. 1977)). The preliminary injunction analysis in *Sage* used the *Blackwelder* balance of harms test to compare the harms put forth by the pipeline company versus the harms claimed by the landowners. *Sage*, 361 F.3d at 828-29. The Supreme Court rejected such cherry-picking of factors on two points. *Winter*, 555 U.S. at 23. Not only were *each* of the four prongs to be given "proper consideration," *id.*, injunctive relief requires "irreparable injury" to be "*likely*" in the "absence of an injunction, *Id.* at 22 (citing *Lyons*, 461 U.S. at 103). This means that not only does the former point fundamentally undermine the entire

irreparable harm analysis performed in *Sage*, *see Pashby*, 709 F.3d at 320-21 (noting that the Fourth Circuit "recalibrated" its preliminary injunction test after *Winter*, rejecting the *Blackwelder* standard), the latter point leaves the erroneous irreparable harm analysis in *Sage* unsalvageable by means of analogy as well.

For instance, in *Sage*, the Fourth Circuit affirmed the lower court's and the East Tennessee National Gas Company's "estimat[ions]." *Sage*, 361 F.3d at 828-29 ("ETNG *estimated* that if possession on some tracts was deferred until completion of the hearings, construction *could* be delayed until the Summer 2004 or beyond;" "A North Carolina gas utility *may* not be able to meet its customers' demand … if ETNG does not complete the project on time;" "ETNG *estimates* that it would lose in excess of $5 million if construction delay caused it to breach its contractual obligations") (emphasis added). The Fourth Circuit went further and accepted the lower court's consideration of purely hypothetical harm. *See id*. ("[S]eperate hearings on compensation would be required for each" property owner, which "will obviously take an extended period of time;" "[Building a] pipeline is a complex project that can only progress in phrases…the district court recognized, 'any single parcel has the potential of holding up the entire project[,]' … 'requir[ing] ETNG to [accommodate] would prove wasteful and inefficient.'"). Rather than point to a "demonstrat[ion] that irreparable injury [was] *likely* in the absence of an injunction," *Winter*, 555 U.S. at 22, the Fourth Circuit in *Sage* extrapolated on what would be a possible injury.

Second. The decision in *Winter* directly tied Article III standing to the preliminary injunction. The Supreme Court in *Winter* cited its decision in *Lyons* to hold that the "*likely*"-standard is the proper standard for preliminary injunctions. *Winter*, 555 U.S. at 22 (citing *Lyons*, 461 U.S. at 103). What the Supreme Court in *Winter* cited in the *Lyons* decision was the principle "that case-or-controversy considerations obviously shade into those determining whether the complaint states a sound basis for equitable relief." *Lyons*, 461 U.S. at 103 (quotations omitted). Far from just clarifying the proper standard for

analyzing preliminary injunctions, the Supreme Court in *Winter* relied upon principles of Article III standing put forth in *Lyons* and bundled them to the preliminary injunction analysis. Accordingly, the reasoning of the Fourth Circuit in *Sage*, discussed above and relied upon by MVP, comes in direct conflict with what the *Winter* Court said, "[a] preliminary injunction will not be issued simply to prevent the possibility of some remote future injury." *Winter*, 555 U.S. at 22 (quoting *Lyons*, 461 U.S. at 154-55).

Third. The Supreme Court recently clarified that "takings claims" are to be treated equal to "any other claim grounded in the Bill of Rights." *Knock v. Township of Scott*, 139 S. Ct. 2162, 2173 (2019). The Fourth Circuit in *Sage*, as mentioned above, used the *Blackwelder* balancing of harms test to grant the pipeline company a preliminary injunction – weighing the harms to the pipeline versus the harms claimed by the landowners. *Sage*, 361 F.3d at 828-29. Though discussed in more detail in the appropriate section, the Fourth Circuit in *Sage* treated as significant that the Landowners' harm was "simply a timing argument" and "slight at best" when comparing the harms. *Id.* at 829 (internal quotation marks omitted). Such harm, according to the Fourth Circuit in *Sage*, was incomparable to the harm the pipeline company hypothesized. *Id*. Such a harm is no longer slight at best. *See Leaders of a Beautiful Struggle*, 2 F.4th at 339 ("Because there is a likely constitutional violation, the irreparable harm factor is satisfied."). The Fourth Circuit in *Sage* gave little weight to the what the Supreme Court has described as the "self-executing Fifth Amendment" violation that the landowners would incur "at the time of the taking," *Knock*, 139 S. Ct. at 2172, in favor of the estimated and hypothetical harms proposed and divined by the pipeline company and lower court, 361 F.3d at 828-29. Supreme Court precedent since *Sage* has said that this Court is certainly not at liberty to do so too.

Therefore, *Sage* no longer stands on good ground. The reasoning that once supported *Sage*'s irreparable harm analysis – the same analysis MVP places full faith in both argument and evidence – has been completely and fundamentally undermined.

2. MVP Has Made No Clear Showing of Irreparable Harm

"[E]ven though irreparable injury may otherwise result to the plaintiff," the Court need not "mechanically" grant equitable belief for every bad business decision. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-13 (1982). This is true when, as here, MVP "ha[s] not shown that [it] availed [itself] of opportunities to avoid the injuries of which [it] now complain[s]." *Di Biase v. SPX Corp*., 872 F.3d 224, 235 (4th Cir. 2017). MVP has failed to "establish a[ny] relationship between the injury claimed in the motion [for preliminary injunction] and the conduct giving rise to the complaint." *Sovereign v. Clarke*, No. 7:21-cv-00449, 2022 WL 327740 at *5 (W.D. Va. Feb. 3, 2022) (citing *Omega World Travel v. TWA*, 111 F.3d 14, 16 (4th Cir. 1997)).

As has been demonstrated, MVP has either inflicted harm upon itself or pointed to an injury too conjectural for this Court to consider. MVP seeks refuge in the Fourth Circuit's *Sage* decision. Yet, as explained above, *Sage* no longer satisfies the current requirements for irreparable harm. MVP sought to overload the process, compiling 300 defendants into one complaint. Yet any potential delay has been manufactured by MVP's efforts—or lack thereof. *See* W.D. Va. Tr. 287:14-16 (Testimony of Samuel Long) (MVP did not attempt to properly appraise any property it sought to take until two months ago). "When a party seeking equitable relief 'has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him.'" *Ramirez v. Collier*, No. 21-5592, 2022 WL 867311, at *13 (U.S. Mar. 24, 2022) (quoting *Keystone Driller Co. v. General Excavator Co.*, 290 U.S. 240, 245 (1933)).

Here, MVP sought this Court's help to rectify a bad business decision. Without standing; absent a clear showing; this Court should find MVP has failed to establish irreparable harm. The motion should be dismissed.

Applicant Details

First Name	**G. Antaeus**
Last Name	**Edelsohn**
Citizenship Status	**U. S. Citizen**
Email Address	**gedelsoh@gmail.com**
Address	**Address** **Street** **10804 Westek Drive** **City** **Henrico** **State/Territory** **Virginia** **Zip** **23233** **Country** **United States**
Contact Phone Number	**925-395-1177**
Other Phone Number	**202-770-1655**

Applicant Education

BA/BS From	**University of California-Santa Cruz**
Date of BA/BS	**December 2012**
JD/LLB From	**University of Richmond School of Law** **http://www.nalplawschoolsonline.org/content/OrganizationalSnapshots/OrgSnapshot_235.pdf**
Date of JD/LLB	**May 7, 2022**
Class Rank	**50%**
Law Review/ Journal	**Yes**
Journal(s)	**University of Richmond Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**University of Richmond Moot Court**

Bar Admission

Admission(s) **California, District of Columbia, Vermont**

Prior Judicial Experience

Judicial Internships/ Externships **Yes**

Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

Eisen, Joel
jeisen@richmond.edu
804-587-6511

Gunn, Elizabeth
elizabeth_gunn@dcb.uscourts.gov
(202) 354-3030

Williams, Clark
cwilliam@richmond.edu

References

Hon. Keith L. Phillips
United States Bankruptcy Court Judge for the Eastern District of Virginia Keith_Phillips@vaeb.uscourts.gov
(804) 916-2460

This applicant has certified that all data entered in this profile and any application documents are true and correct.

G. Antaeus B. Edelsohn, J.D., M.A.
gedelsoh@gmail.com | +1 925-395-1177

June 21, 2023

Robert F. Peckham Federal Building and U.S. Courthouse
280 S Second Street
San Jose, CA 95113

Re: <u>Term Law Clerk to the Hon. P. Casey Pitts</u>

To Whom It May Concern:

I had the great honor of serving as a legal intern/student clerk to two federal judges during my time in law school. To say those experiences were some of the most instructive and meaningful in my burgeoning legal career would be an understatement. The opportunity to apply my legal research and writing skills in a practical setting, while simultaneously being able to learn from federal trial judges was invaluable. I particularly appreciated the scope and nuance of law which is required by judicial work, as I genuinely enjoy delving deeply into existing statutes and regulations (and their histories), and exploring novel and creative legal theories dealing with the application of law and policy. I also have a strong interest in IP law, specifically regarding trade secrets and the Economic Espionage Act. It is for this reason that I am interested in gaining additional judicial experience by being a clerk for Judge P. Casey Pitts.

My best asset for this role is my diligence and drive in how I carry out my work. It was not until I had the opportunity of a lifetime, to intern with Judge Elizabeth Gunn, that I began learning about bankruptcy law. Though my schedule prevented me from taking the bankruptcy course at UR Law, I received permission from the professor to access his lecture recordings and audit his course on the side, in addition to reading his bankruptcy hornbook. By the end of my internship with Judge Gunn, I was writing bench memos for use regarding novel areas of bankruptcy, assisted with the CLE materials for the 36th Annual Mid-Atlantic Institute on Bankruptcy and Reorganization Practice 2021, and I drafted some opinions for the Judge, among other tasks. This learning experience was invaluable in my second judicial internship, where I was the first legal intern which Judge Keith L. Phillips trusted to draft an opinion for him to issue. I can guarantee my work in this role will be of an equally superior level.

I know that while this position requires a high level of research and analysis, as well as written and oral communication, just as important is the requisite high level of harmony and trust among the judge and each member of the chambers staff. While I have a focused and serious attitude when it comes to the quality of my work, I always try to add to a friendly and pleasant work environment, and I encourage you to ask both judges and their career clerks about my presence and personality in chambers.

One final note about my character and inner drive, as in general I feel actions speak louder than words. While I was working in Congress, I spent my Sundays volunteering with the National Park Service. Even after a long and tiring week of work, I was always excited and eager to get out and work at the WWI memorial as an interpretive volunteer. If chosen for this position, I would bring the same passion, energy, and enthusiasm to my role as Judge Pitts' clerk, as I do to all my other pursuits.

I thank you in advance for considering my application.

Sincerely yours,
G. Antaeus B. Edelsohn, J.D., M.A.

G. Antaeus B. Edelsohn, J.D., M.A.
gedelsoh@gmail.com | +1 925-395-1177

Licensed Attorney: ***California – Vermont – Washington D.C.***

EDUCATION

University of Richmond School of Law **Richmond, VA**
Juris Doctor May 2022

- Lewis F. Powell, Jr. American Inn of Court, Student Member
- *University of Richmond Law Review* (July 2020 – December 2021)
- Moot Court Board

Tel Aviv University **Tel Aviv, Israel**
Master of Arts – Security Studies and Diplomacy October 2017

University of California at Santa Cruz **Santa Cruz, CA**
Bachelor of Arts – (Double major) Economics; Film and Digital Media December 2012

PROFESSIONAL EXPERIENCE

Carolina Legal Staffing **Remote**
Attorney – Contract April 2023 – Present
Assisting Moore&VanAllen, PLLC, on a comprehensive national review of state laws and regulations for a large national bank. Duties include research of applicable laws and regulations, and drafting of specific compliance requirements.

Law Office of G. Antaeus B. Edelsohn, Esq. **Remote**
Attorney August 2022 – Present
Brief writing and review, contracts review, legal advising on federal statutes, legal research services, landlord/tenant disputes.

Enquire AI (Formerly GlobalWonks) **Remote**
Independent Expert at Enquire (analyst/consultant) January 2018 – Present
Provide geopolitical analysis to a wide variety of international clients with a focus on political, security, and trade issues in the U.S., MENA, and East and Southeast Asia. Topics include RE minerals, tariffs, int'l negotiations, among others.

United States Bankruptcy Court **Washington, DC & Richmond, VA**
Legal Intern May 2021 – September 2021; January 2022 – May 2022
Performed tasks of a judicial clerk for Hon. Elizabeth L. Gunn of the District of Columbia, and the Hon. Keith L. Phillips of the Eastern District of Virginia. Tasks included: drafting bench memos, legal opinions, research, case prep, etc.

Committee on Ways and Means, United States House of Representatives **Washington, DC**
Policy Intern September 2021 – December 2021
Drafted policy memoranda on current and prospective policies regarding Social Security, the Social Security Administration, and anything which falls under Titles II and VII of the Social Security Act. I have also drafted bill proposals to implement changes or improvements in line with my recommendations, and participated in weekly meetings/updates with representatives of the Social Security Administration and my Committee's Senate counterparts.

PLG Pangolin **Richmond, VA**
Student Legal Intern January 2021 – May 2021
Provided legal advice to a foreign gig-economy start-up, pertaining to labor, data privacy, IP, and anti-corruption laws in the U.S., Canada, and Mexico.

UR Law International Law Practicum **Richmond, VA**
Student Legal Intern January 2021 – May 2021
Provided legal analysis to the NGO Independent International Legal Associates (IILA), on the global applicability of international humanitarian law and international human rights law in cyberspace.

Provided legal analysis to the Secretariat of the International Convention on Settlement of Investment Disputes (ICSID), surveying laws and guidelines regulating confidentiality and doc production rules in international investment arbitration.

UNIVERSITY OF RICHMOND

Student No: ***-**-9886 UR ID: 44314916 Date Issued: 12-APR-2023
AEEE

Record of: Gabriel Antaeus B Edelsohn Page: 1
Issued To: G. Antaeus Edelsohn
Parchment DocumentID: TWC0DYXM

Course Level: Law
Only Admit: Fall 2019

Current Curriculum
Juris Doctor
College : School of Law
Major : Law

Degrees Awarded Juris Doctor 07-MAY-2022
Ehrs: 87.00 GPA-Hrs: 46.00 QPts: 155.80 GPA: 3.38
Degree Curriculum
College : School of Law
Major : Law

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
INSTITUTION CREDIT:						
Fall 2019						
LAWR	513	CONTRACTS	4.00	B+	13.20	
LAWR	514	TORTS	4.00	B+	13.20	
LAWR	515	CIVIL PROCEDURE	4.00	B+	13.20	
LAWR	517	LEGAL ANALYSIS & WRITING I	2.00	B+	6.60	
LAWR	520	LEGAL RESEARCH I	0.00	S	0.00	
Ehrs: 14.00 GPA-Hrs: 14.00 QPts: 46.20 GPA: 3.30						
Spring 2020						
COVID-19 Pandemic.						
All courses graded Credit/No credit.						
LAWR	503	CONSTITUTIONAL LAW	4.00	CR	0.00	
LAWR	506	CRIMINAL LAW	3.00	CR	0.00	
LAWR	516	PROPERTY	4.00	CR	0.00	
LAWR	518	LEGAL ANALYSIS & WRITING II	2.00	CR	0.00	
LAWR	519	LEGISLATION AND REGULATION	3.00	CR	0.00	
LAWR	521	LEGAL RESEARCH II	1.00	CR	0.00	
Ehrs: 17.00 GPA-Hrs: 0.00 QPts: 0.00 GPA: 0.00						
Fall 2020						
LAWE	599	EVIDENCE	4.00	B+	13.20	
LAWE	602	BUSINESS ASSOCIATIONS	4.00	B+	13.20	

********** CONTINUED ON NEXT COLUMN **********

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
Institution Information continued:						
LAWE	607	ADMINISTRATIVE LAW	3.00	B+	9.90	
LAWE	655	INTELLECTUAL PROP LAW & POLICY	3.00	A-	11.10	
LAWE	780	RESEARCH ASSISTANT-P/F	1.00	P	0.00	
LAWR	598	TRIAL ADVOCACY	2.00	P	0.00	
Ehrs: 17.00 GPA-Hrs: 14.00 QPts: 47.40 GPA: 3.38						
Spring 2021						
LAWE	621	CONFLICT OF LAWS	3.00	B+	9.90	
LAWE	656	REMEDIES	3.00	A-	11.10	
LAWE	685	INTERNATIONAL LAW PRACTICUM	3.00	P	0.00	
LAWE	699	ARMED CONFLICT,NAT'L SECURITY	2.00	B+	6.60	
LAWE	724	PROF RESPONSIBILTY:FAMILY LAW	2.00	B+	6.60	
LAWE	756	INTERNATIONAL BUSINESS PRACTIC	4.00	A-	14.80	
Ehrs: 17.00 GPA-Hrs: 14.00 QPts: 49.00 GPA: 3.50						
Fall 2021						
LAWE	745	D.C. EXTERNSHIP	13.00	P	0.00	
Ehrs: 13.00 GPA-Hrs: 0.00 QPts: 0.00 GPA: 0.00						
Spring 2022						
LAWE	671	INTERVIEW/NEGOTIATE/COUNSELING	4.00	B+	13.20	
LAWE	749	EXTERNSHIP: LITIGATION	5.00	H	0.00	
Ehrs: 9.00 GPA-Hrs: 4.00 QPts: 13.20 GPA: 3.30						

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	87.00	46.00	155.80	3.38
TOTAL TRANSFER	0.00	0.00	0.00	0.00
OVERALL	87.00	46.00	155.80	3.38

********** END OF TRANSCRIPT **********

Kristen A. Ball, University Registrar

OFFICE OF THE UNIVERSITY REGISTRAR
UNIVERSITY OF RICHMOND, VIRGINIA 23173
(804) 289-8639
email: registrar@richmond.edu / website: www.registrar.richmond.edu

COURSE CREDIT
As of Fall 2008, the undergraduate divisions of the School of Arts and Sciences, the Robins School of Business, and the Jepson School of Leadership Studies converted from semester hours to units. A 1-unit course is equivalent to 3.5 semester hours. For all other schools (and the above schools prior to Fall 2008), course credit is awarded on the semester hour system. Credit is determined by a variety of factors, including contact time with a faculty member in a formal setting and expectations of independent study work through a nominal 15-week semester.

GRADING SYSTEM: since 1966

A+	4.0	
A	4.0	Excellent range
A-	3.7	
B+	3.3	
B	3.0	Good range
B-	2.7	
C+	2.3	
C	2.0	Average range
C-	1.7	
D+	1.3	
D	1.0	Poor range
D-	0.7	
F	0.0	Failure
I	0.0	Punitive Incomplete (make-up grade may appear to right of "I")
M	0.0	Withdrew Failing
V	0.0	Failure, excessive absence
H	---	Honors
P	—	Pass
S	—	Satisfactory, non-academic credit
U	—	Unsatisfactory, non-academic credit
W	—	Withdrew Passing
X	—	Grade unavailable
Y	—	Non-punitive Incomplete (make-up grade may appear to right of "Y")
Z	—	Audit
TR	—	Transfer

- Effective Fall 2008 and between Spring 1989 and Summer 1992, an approved undergraduate course taken for graduate credit is designated by a course number below the 500 level followed by a G.
- Prior to 1966 the 3.0 system was used, A=3 etc.
- Prior to Fall 1986, "0" designated failure for excessive absence, and except for Law, "+/-" did not affect the GPA. Prior to Fall 2002, "+/-" did not affect the GPA of Graduate Business students.
- Effective Summer 1992, graduate courses are transcripted separately from undergraduate courses.
- Prior to Summer 1992, courses numbered above the 400 level are graduate level unless otherwise indicated.
- Prior to Spring 1989, an approved undergraduate course taken for graduate credit is designated by a 400-level course number.

SCHOOL OF LAW
- Effective Fall 2014, faculty policy provides for assignment of a mean grade of 3.3 in all classes.
- Prior to Fall 2014, faculty policy provides for assignment of median grades of B in all first-year classes.
- Prior to Fall 2001, faculty policy provides for assignment of median grades of B• in all first-year classes.
- Prior to Spring 1992, faculty policy provides for assignment of median and mode grades of C+ in all required classes.
- The law degree was the Bachelor of Laws (LLB) through 1969, Juris Doctor (JD) thereafter. LLB recipients have been given the option to exchange the LLB designation for the JD.
- Effective 2016: 87 hours required for graduation.
- 1993 – 2015: 86 hours required for graduation.
- 1973 - 1992: 90 hours required for graduation.
- 1942 - 1945: 80 hours required for graduation.
- 1975 - Pres: Grading scale outlined above except A+ and D• are not awarded.
- 1972 - 1975: D = 55 - 61, F = Below 55.
- 1938 - 1972: A = 80 - 100%, B = 70 - 79, C = 62 - 69, D = 60 - 61, E = 50 - 59, F = Below 50, with 84 hours required for graduation.

COLLEGE/SCHOOL NAMES
Prior to 1992, undergraduate liberal arts students were enrolled in and graduated from Richmond College or Westhampton College. Since Fall 1992, undergraduate students are enrolled in the School of Arts and Sciences, The E. Claiborne Robins School of Business, and the Jepson School of Leadership Studies. Richmond College and Westhampton College now serve as the undergraduate colleges.

Effective Fall 1994, the name of the University College changed to the School of Continuing Studies. Effective Fall 2012, the name of the School of Continuing Studies changed to the School of Professional and Continuing Studies.

Effective Fall 2022, the name of the T.C. Williams School of Law changed to the School of Law.

ACCREDITATION
The University of Richmond is accredited by the Southern Association of Colleges and Schools Commission on Colleges (SACSCOC) to award baccalaureate, masters, and juris doctor degrees. Questions about the accreditation of the University of Richmond may be directed in writing to the Southern Association of Colleges and Schools Commission on Colleges at 1866 Southern Lane, Decatur, GA 30033-4097, by calling (404) 679-4500, or by using information available on SACSCOC's website (www.sacscoc.org). The University also is approved by the Virginia State Board of Education to offer teacher licensure programs. Various departments and divisions have more specialized accreditation. Included in this category are the chemistry program, accredited by the American Chemical Society; and the undergraduate teacher preparation programs and graduate certificate in teacher licensure program, accredited by the Teacher Education Accreditation Council. In addition, the Robins School of Business is accredited by the Association to Advance Collegiate Schools of Business International (AACSB) at the undergraduate and graduate levels, and the School of Law is fully accredited by the recognized standardizing agencies in the United States, on the approved lists of the American Bar Association, and a member of the Association of American Law Schools.

REPEATED COURSES
Repeated courses are noted to the right of the quality points earned for that course as follows:

I = earned hours included; calculated in GPA
A = earned hours excluded; calculated in GPA
E = earned hours excluded; not calculated in GPA

Consult the appropriate catalog for information on course repeat policies.

TRANSCRIPT VALIDATION
An official transcript is printed on secure paper with a blue background. When photocopied, the word COPY will appear. Further authentication may be obtained by calling the Office of the University Registrar.

GRADE POINT AVERAGE CALCULATION
The grade point average is calculated by dividing the total number of grade points earned by the total number of GPA hours. The grade point average is represented to two significant decimal points and truncated, not rounded. Transfer work does not calculate in the grade point average.

CONTINUING EDUCATION UNITS (CEUs)
The continuing education unit is used to recognize participation in non-credit classes, courses, and programs. The University of Richmond assigns CEU credit based on the SACSCOC's *C.E.U.: Guidelines and Criteria*. Such non-credit courses are designated as "CE" level and have an "M" or "N" attached to the course number. They are graded as satisfactory/unsatisfactory and cannot be used to satisfy any requirements in any degree program.

RELEASE OF INFORMATION
This transcript cannot be released to any third party without the written consent of the student in accordance with the Family Educational Rights and Privacy Act of 1974 (the Buckley Amendment). The message "Issued to Student" will be noted on the transcript when the transcript is provided directly to the student.

United States Bankruptcy Court
District of Columbia

CHAMBERS OF
ELIZABETH L. GUNN
UNITED STATES BANKRUPTCY JUDGE

202-354-3030

April 21, 2023

Dear Colleague,

I am pleased to provide this recommendation for my former intern G. Antaeus Edelsohn in support of his application to clerk for your chambers. Antaeus is not only a former intern, but also a neighbor whom I had the privilege of swearing into both the Vermont and District of Columbia bars. I was happy to welcome Antaeus as an intern in my chambers in the Summer of 2021. Having taken the bench in September 2020, Antaeus was one of my first full-time summer interns and set the bar very high for future intern classes. Antaeus ended up staying with my chambers for a time into the fall of 2021, and then followed my internship with a term internship with Bankruptcy Judge Keith Phillips in the Eastern District of Virginia.

Due to the pandemic, Antaeus' internship was almost entirely remote, with the primary methods of communication via Zoom meetings, Microsoft Teams messenger, and email. Antaeus' only trip to the courthouse was not a "typical" intern experience as I was located in temporary chambers and there was little infrastructure for interns at the time. Despite each of these challenges, Antaeus' attitude, enthusiasm for the law, and dedication to his work for chambers was clear. Much of the work completed by Antaeus during his time in chambers formed the basis for written opinions issued thereafter.

In his work, Antaeus was prompt, attentive, and asked insightful questions that clarified the assignment. From that foundation he then produced high quality work, readily accepting constructive criticism, and deftly incorporated the same into his work. As a rising 3L intern, I endeavored to provide him with assignments that would prepare him for either a future clerkship or employment. As such, Antaeus was tasked not only with legal research, but also with docket prep and initial drafts of sections of opinions.

On a personal level, Antaeus was a pleasure to have in chambers and I've appreciated continuing to see him around the neighborhood. He has a dry sense of humor and an interesting world view drawn from his military service. In light of my experience with him as an intern, Antaeus has all the tools to be a law clerk and a wonderful addition to chambers. I recommend his consideration for your term clerk position.

Please do not hesitate to contact me with any questions.

All the best,

/s/ Elizabeth L. Gunn

Elizabeth L. Gunn

MEMORANDUM

To: Career Clerk
From: Antaeus Edelsohn
Date: March 04, 2022
Re: The Ability of a Debtor and Chapter 13 Trustee To Avoid Transfers Under §§ 544, 548, and 550

Question(s) Presented

Does the Debtor have the power to avoid fraudulent transfers under 11 U.S.C. § 544, 548, and 550?

Does the Chapter 13 Trustee have the power to avoid fraudulent transfers under the same sections?

Can the Debtor and Chapter 13 Trustee jointly bring an adversary proceeding to avoid fraudulent transfers under those sections?

Short Answer

There is a split in the courts regarding who may use the strong-arm powers of sections 544, 548 and 550, however I do not believe Your Honor needs to choose one side or another in this matter as the Debtor and Trustee are joint plaintiffs in the AP. For the courts which hold only the Trustee has the authority to exercise those powers, the Trustee is determined to be an indispensable party for any action which would involve property of the estate under those provisions. As such, Debtor's inclusion of the Trustee as a co-plaintiff is the appropriate action and the Trustee would have authority to act. For the courts which hold the debtor can exercise the powers of a trustee, the fact Mr. Moore is a named plaintiff would not be an issue.

I believe part of the confusion regarding this issue is due to the language which the Defendant uses in her briefs to argue against this action by Debtor and Trustee.

Detailed Answer

Avoidance Powers

Regarding the specifics of the powers granted to the Chapter 13 Trustee, "[t]here is general agreement that the Chapter 13 trustee has standing to avoid transfers and recover property under §§ 544 (strong-arm power), 547 (preferences), 548 (fraudulent conveyance) and 549 (postpetition transfers)." KEITH M. LUNDIN, LUNDIN ON CHAPTER 13, § 53.12, at ¶ 1, LundinOnChapter13.com. The Corpus Juris Secundum states:

> [T]he omission of 11 U.S.C.A. §704(a)(1) from the Chapter 13 trustee's duties, as enumerated in 11 U.S.C.A. §1302(b)(1), cannot be read so far as to preclude the use of the Chapter 5 avoidance powers by the trustee, and it is left to the Chapter 13 trustee's judgment to determine when it is feasible and efficient to exercise the avoidance powers. The exercise of avoidance powers is consistent with a Chapter 13 trustee's duty, pursuant to statute, to advise and assist the debtor in performance under a plan. Thus, a Chapter 13 trustee may avoid transfers of property or obligations of the debtor under 11 U.S.C.A. § 544, may avoid a preference under 11 U.S.C.A. §547(b), and may recover a fraudulent transfer under the provisions of 11 U.S.C.A. §548.

8A C.J.S, *Bankruptcy*, §262 (2022).

Some courts have held section 1306(b) of the Bankruptcy Code grants these same broad avoidance powers to a debtor as well as a trustee. *See Houston v. Eiler (In re Cohen)*, 305 B.R. 886, 899 (9th Cir. BAP 2004)("If we regard §1303 as ambiguous and look at legislative history for guidance, a strong case for debtor standing to assert trustee avoiding powers becomes a compelling case."); *In re Smith*, No. 12-41260, AP No. 13-4009, 2014 Bankr. LEXIS 1538, at

*6–7 (Bankr. W.D. Ky. April 10, 2014)(specifying policy concerns support granting Chapter 13 debtor's the standing to utilize strong-arm avoidance powers instead of adhering to a strictly technical approach). The majority of courts reject this view and hold the "strictly technical approach," that only the trustee has the power to act under sections 544, 547, and 548.

Assuming the Trustee is the only one with the authority to bring avoidance actions under chapter 5, the Trustee would be an indispensable party to any legal action which would affect the property of the estate. *See Wood v. Mize (In re Wood)*, 301 B.R. 558, 562 (Bankr. W.D. Mo. 2003) ("[T]he trustee is an indispensable party within the context of this proceeding because he is the only person with standing to bring the action and full relief cannot be accorded the creditors of the estate without his joinder. . . ."). Alternatively, if the Debtor has concurrent or individual authority to bring such an action, the fact the Debtor is a listed plaintiff should suffice for the action to be valid.

That being said, the fact that both Debtor and the Trustee are co-plaintiffs would seem to preclude the need for this Court to make a determination of which view it holds at this time.

Issues with Defendant's Language and Argument

The Defendant takes issue with the inclusion of the Chapter 13 Trustee as a co-plaintiff in the adversary proceeding and tries to argue the trustee is named as a mere nominal party to claim the actions benefit the estate. *See* ECF no. 5, ¶ 4. This argument is problematic on two grounds.

The first problem is Defendant's argument seems predicated on the notion of the bankruptcy estate being limited to the amount the debtor owes to creditors, contained in the legal entity which is created upon the filing of a petition. Caselaw directs this is not so; the Delaware District Court provides a rather comprehensive overview of what is included in a debtor's estate

in *PAH Litig. Trust v. Water Street Healthcare Partners, L.P. (In re Physiotherapy Holdings, Inc.)*:

> [I]n *Moore v. Bay*, 284 U.S. 4 (1931) . . . the Supreme Court held that a bankruptcy trustee could avoid a fraudulent transfer in its entirety, for the benefit of the estate, and that recovery was not limited to the amount of the unsatisfied creditor's claim. *Id.* at 4-5. According to *In re DLC, Ltd.*, 295 B.R. 593, 606 (B.A.P. 8th Cir. 2003), *Moore v. Bay* is codified by Section 550. A trustee may thus avoid a transfer beyond the extent necessary to satisfy a creditor's claim. The Trustee may avoid the entire transfer for the 'benefit of the estate.' *MC Asset Recovery*, No. 1:06-CV-0417-BBM, 2006 U.S. Dist. LEXIS 97034, at *4 (N.D. Ga. Dec. 11, 2006). Furthermore, and contrary to Defendants' position, 'for the benefit of the estate' does not mean for the benefit of creditors. 'Estate' means 'all legal or equitable interests of the debtor in property as of the commencement of the case.' *Tronox Inc. v. Anadarko Petro. Corp. (In re Tronox Inc.)*, 464 B.R. 606, 613 (Bankr. S.D.N.Y. 2012) (quoting 11 U.S.C. § 541). The estate is more than the interest of creditors. *Mellon Bank, N.A. v. Dick Corp.*, 351 F. 3d 290, 293 (7th Cir. 2003) ('Section 550(a) speaks of the benefit to the estate — which in bankruptcy parlance denotes the set of all potentially interested parties — rather than to any particular class of creditors.'); *In re TWA*, 163 B.R. 964, 972 (Bankr. D. Del. 1994) ('Section 550(a) requires a benefit to the 'estate,' not to creditors. 'Estate' is a broader term than 'creditors.').

PAH Litig. Trust v. Water Street Healthcare Partners, L.P. (In re Physiotherapy Holdings, Inc.), No. 13-12965; AP No. 15-51238, 2017 Bankr. LEXIS 3774, at *28–29 (Bankr. D. Del. Nov. 1, 2017).

There is no uniform consensus on whether this means recovery of property by a trustee under sections 548 and 550 is capped at the aggregate sum of all unsecured claims, however the weight of opinions seems to lean toward no cap on the amount a trustee may recover. *See Clinton v. Acequia, Inc. (In re Acequia, Inc.)*, 34 F.3d 800, 812 (9th Cir. 1994) ("the [estate] has a greater equitable claim to the transferred funds than does [the defendant wrongdoer]."); *In re JTS Corp.*, 617 F.3d 1102, 1113 (9th Cir. 2010) (noting it is "improper to limit a trustee's recovery under § 544(b) and § 550(a) based on the total amount of unsecured claims against the bankrupt estate."). Collier takes the same position, albeit with a caveat:

> The amount that the trustee can recover from the initial or subsequent transferee is not limited by the total amount of allowed unsecured claims. The trustee's avoiding powers are not just for the benefit of the creditors, but are for the benefit of the estate as a whole. . . . However, fraudulent transfer law generally is not intended to aid the debtor-transferor to recover property; a transfer is generally valid as between the debtor and the transferee. Consequently, the transferee should be entitled to retain the property transferred if the estate is sufficient to satisfy all claims, including administrative expenses.

Collier on Bankruptcy 548.10 (16th ed. 2017). That said, the *Tronox* court stated "the 'for the benefit of the estate' clause in § 550 sets a minimum floor for recovery in an avoidance action—at least some benefit to the estate—but does not impose any ceiling on the maximum benefits that can be obtained once that floor is met." *Tronox*, 464 B.R. at 614. Plaintiff's filings indicate

that there would be at least some benefit to the estate if this action were to be pursued, thereby implying that the avoidance action should be permitted.

Second, Defendant seems to misunderstand the role which the Chapter 13 Trustee plays in an adversary procedure of this nature, by using language which appears to separate the Debtor's interests from the estate. The Bankruptcy Code, caselaw, and the leading legal commentaries on the topic makes clear such a position is inapposite. To begin, section 541 of the Bankruptcy Code defines property of the estate as "all legal or equitable interests of the debtor in property as of the commencement of the case," except as otherwise provided in other subparts of the section. 11 U.S.C. § 541(a)(1). "This includes whatever causes of action the debtor may have possessed prior to the petition date. 3 *Collier on Bankruptcy* ¶ 323.03[2]. Thus, a trustee may assert a claim 'as successor to the debtor's interest included in the estate under section 541 or those assigned to the trustee against third parties for the benefit of the estate.' *Id.*" *PAH Litig. Trust v. Water Street Healthcare Partners, L.P. (In re Physiotherapy Holdings, Inc.)*, No. 13-12965; AP No. 15-51238, 2016 Bankr. LEXIS 2810, at *52 (Bankr. D. Del. June 20, 2016). While the Chapter 13 Trustee has powers to manage the estate, Defendant's argument seems to ignore the fact that the debtor does not lose his interest in the estate. Specifically, "unless otherwise specifically provided by the debtors' [sic] plan, a [Chapter 13] debtor remains in possession of all of his or her assets pre- and post-confirmation.' *In re Griner*, 240 B.R. 432, 436 (Bankr. S.D. Ala. 1999).

Some courts have argued this right to hold property effectively makes a Chapter 13 debtor a debtor-in-possession, at least to the extent that the debtor's authority is not limited by section 1303 of the Bankruptcy Code. *E.g. In re McConnell*, 390 B.R. 170, 180 (Bankr. W.D. Pa. 2008). This position has been held across Circuits. "Unlike a Chapter 7 debtor, therefore, a

Chapter 13 debtor-in-possession has rights that are defined by FED. R. BANKR. P. 6009, which states that 'the trustee or debtor in possession may prosecute . . . any pending action . . . by or against the debtor, or commence and prosecute any action or proceeding in behalf of the estate before any tribunal.' FED. R. BANKR. P. 6009." *Lujano v. Town of Cicero*, No. 07 C 4822, 2012 U.S. Dist. LEXIS 141053, at *25 (N.D. Ill. Sept. 28, 2012). Furthermore, at the conclusion of a chapter 13 case, the estate reverts fully back to the debtor. Since the "principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor,'" it only makes sense that the powers granted under the Bankruptcy Code to both the Chapter 13 Trustee and the debtor, to benefit the estate, would encompass actions which would benefit the debtor as well as the creditors. *Marrama v. Citizens Bank*, 549 U.S. 365, 367 (2007) (quoting *Grogan v. Garner*, 498 U.S. 279, 286, 287 (1991)). The avoidance action present before Your Honor appears to be consistent with the scope of permissible avoidance actions envisioned by the Code.

Conclusion

There is substantial caselaw to support a finding that either the Debtor or the Trustee has the ability to bring an avoidance action under 11 U.S.C. § 544, 548, and 550. While the caselaw is at odds regarding whether only one party has the ability to bring such an action, to the exclusion of the other, I do not feel this is a matter which Your Honor needs to address in order to resolve the present matter. Specifically, the fact that both Debtor and Trustee are named plaintiffs, and there appears to be universal agreement that at least one of them has the authority to bring this action, Defendant's motion is without merit. Indeed, Your Honor can address the fact of a split in the views of various courts but say it is not necessary to state the position of this court to resolve the matter.

MEMORANDUM

To: Judge Elizabeth Gunn
From: Antaeus Edelsohn
Date: Aug 25, 2021
Re: Circumstances and Requirements to Revoke *Pro Hac Vice* Admission

Question Presented:

What are the circumstances and requirements for when a court may revoke a *pro hac vice* admission?

Short Answer:

Admission *pro hac vice* is a privilege and not a right, the granting of which is a matter of grace resting in the sound discretion of the presiding judge. The Supreme Court has held that a federal court has the power to control admission to its bar and to discipline attorneys who appear before it. Once admitted *pro hac vice*, attorneys are expected to adhere to the same rules of procedure and professional conduct as members of the bar of that jurisdiction. The Supreme Court has emphasized that courts of justice are universally acknowledged to be vested, by their very creation, with powers to impose silence, respect, and decorum on those who appear before them. As a result, a federal court may revoke an attorney's *pro hac vice* admission at any time, as long as the requisite conditions are met: (1) there must be good cause for revoking the admission; (2) the attorney who is to be disciplined is entitled to due process and must be given a meaningful opportunity to be heard; (3) the sanction must be carefully calibrated to be no greater than necessary, and thus must not be an abuse of discretion.

The revocation of a *pro hac vice* admission need not be predicated on one single violation or one single act of bad conduct, though one act may suffice if it is sufficiently egregious, but can be due to a combination of misconduct and disregard for local rules, or a pattern of behavior which taint the underlying proceedings.

It is important to note, a court's control over an attorney's *pro hac vice* status, seen in the power to grant and to revoke, serves a critical function. Not only is this power necessary to maintain the authority of the court over those who appear before it, but it also serves to prevent an out-of-state attorney from flying it, committing violations, and then return to their home jurisdictions with impunity (perhaps to act in a similar fashion again in a separate court).

Detailed Answer:

Revocation of Pro Hac Vice *in D.C. Courts*

The Local Rules for the District of Columbia provide for situations where attorneys who are not admitted to the local Bar might still seek limited admission to represent a particular client in an particular case, *pro hac vice*: "An attorney who is not a member of the Bar of this Court may be heard in open court only by permission of the judge to whom the case is assigned, unless otherwise provided by the Federal Rules of Civil Procedure." Loc. Civ. R. 83.2(d) (D.D.C.). Nevertheless, admission *pro hac vice* is uniformly understood to be a privilege, and not a right. *See Leis v. Flynt*, 439 U.S. 438, 442 (1979) (per curiam); *Royce v. Michael R. Needle P.C.*, 950 F.3d 939, 954 (7th Cir. 2020); *Ramirez v. England*, 320 F. Supp. 2d 368, 374 (D. Md. 2004); *Obert v. Republic Western Ins. Co*., 190 F. Supp. 2d 279, 298 (D.R.I. 2002); *Steinbuch v. Cutler*, 463 F. Supp. 2d 4, 7 (D.D.C. 2006). Additionally, once an attorney is admitted *pro hac vice*, she is "expected to adhere to the same rules of procedure and professional conduct as members of the bar of this jurisdiction." *Steinbuch* 463 F. Supp. 2d at 7; Loc. Civ. R. 83.2 and 83.12 (D.D.C.). Indeed, the Supreme Court has affirmed a district or bankruptcy court has inherent authority "to control admission to its bar and to discipline attorneys who appear before it." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (citing *Ex parte Burr*, 22 U.S. 529, 9 Wheat. 529, 531 (1824)).

Though the Supreme Court has admonished that such power "ought to be exercised with great caution," the endowment of such powers is "incidental to all courts." *Id. See also In re Snyder*, 472 U.S. 634, 645 n.6 (1985) ("Federal courts admit and suspend attorneys as an exercise of their inherent power."). Put a different way, the Supreme Court held that the "power to punish for contempts is inherent in all courts; its existence [being] essential to the preservation of order in judicial proceedings." *Ex parte Robinson*, 86 U.S. 505, 510 (1873). More specifically, it held that "summary punishment for contempts may be inflicted" in cases "where there has been misbehavior of any officer of the courts in his official transactions." *Id.* at 511. Thus, it is only logical that "[w]hen an attorney abuses the privilege of appearing pro hac vice, the district court may revoke that privilege as a sanction for misconduct." *Royce* 950 F.3d at 954.

Despite the longstanding articulation of the powers of a federal court to regulate its Bar, "[r]evocation of *pro hac vice* status is rare in [the D.C.] Circuit," and is subject to an "extraordinarily high burden." *Steinbuch v. Cutler*, 463 F. Supp. 2d 4, 7 (D.D.C. 2006). That burden was articulated by the D.C. Circuit Court in *Koller v. Richardson–Merrell, Inc.,* 737 F.2d 1038, 1056 (D.C. Cir. 1984), *vacated on other grounds,* 472 U.S. 424, 105 S. Ct. 2757, 86 L.Ed.2d 340 (1985), and indicated that disqualification should be limited to situations "'where the attorney's unprofessional conduct may affect the outcome of the case.'" *Id.* at 1056 (quoting *Board of Educ. of New York City v. Nyquist*, 590 F.2d 1241, 1248 (2d Cir. 1979) (Mansfield, J. *concurring*). The *Koller* court also indicated that disqualification could be appropriate where an "attorney's conduct tends to 'taint the underlying trial,'" either through a "'conflict of interest'" or through the unethical use of privileged information, "'thus giving his present client an unfair advantage.'" *Id*. at 1055–56. That said, one court qualified the "taint" which this standard considers as being more than merely "an attorney's ethical violation, by itself," but specified that

the "unethical conduct must also threaten to impact the outcome of the trial." *Paul v. Judicial Watch, Inc*., 571 F. Supp. 2d 17, 22 (D.D.C. 2008). The court went on to say "it is clear to this Court that a motion to disqualify can be granted on the basis of a violation of Rule 1.9, without any further showing. . . ." *Id.* at 26.

While a court may have broad powers, however, regarding the imposition of sanctions to regulate the members of its Bar, "[a]ny sanction imposed must be carefully calibrated and be no greater than necessary to achieve the purpose for which the sanction is imposed." *Bonds v. District of Columbia*, 93 F.3d 801, 808–13 (D.C. Cir. 1996). A later district court determined a court may disqualify an attorney from appearing in a case before it "if there is a conflict of interest or if the attorney has committed ethical violations." *Konarski v. Donovan*, 763 F. Supp.2d 128, 135 (D.D.C. 2011). More recently, a court ruled that "[b]efore granting a motion to disqualify, a court must consider 'first, whether a violation of an applicable Rule of Professional Conduct has occurred or is occurring, and if so, whether such violation provides sufficient grounds for disqualification.'" *United States v. Crowder*, 313 F. Supp. 3d 135, 141 (D.D.C. 2018) (quoting *Headfirst Baseball LLC v. Elwood*, 999 F.Supp.2d 199, 204 (D.D.C. 2013). D.C. courts follow the rules promulgated by the District of Columbia Court of Appeals. *See* Loc. Civ. R. 83.15(a).

Comparing Sister Courts' Approaches to This Matter

Beyond the confines of D.C. courts, it can be instructive to look at how our nearby sister courts have addressed the issue of revocation. One court held that "[o]nce admitted, the court may revoke an attorney's status so long as the court articulates specific grounds to the attorney regarding the possibility of revocation prior to revoking his status. *A1 Procurement, LLC v. Thermcor*, *Inc*., No. 15-cv-15, 2015 U.S. Dist. LEXIS 174898, *14 (E.D. Va. Nov. 18, 2015);

see also United States v. Collins, 920 F.2d 619, 626 (1990) (noting that to revoke, the court "must articulate reasonable grounds for denying *pro hac vice* admission"). "Specific grounds for revocation can include unprofessional conduct, violation of the local rules, and a wide variety of ethics violations." *A1 Procurement*, 2015 U.S. Dist. LEXIS 174898 at *14. Courts have also held that the revocation of a *pro hac vice* admission need not be predicated on one single violation or one single act of bad conduct, though one act may suffice if it is sufficiently egregious, but can be due to a combination of misconduct and disregard for local rules, or a pattern of behavior which taint the underlying proceedings. *See La Michoacana Natural, LLC v. Maestre*, No. 17-cv-00727, 2020 U.S. Dist. LEXIS 39142, *12–13 (W.D.N.C. March 6, 2020); *A1 Procurement*, 2015 U.S. Dist. LEXIS 174898 at *16; *Estate of Williams v. Kelly*, No. 18-cv-00182, 2018 U.S. Dist. LEXIS 197756, at *4 (W.D.N.C. Nov. 20, 2018) (noting the Court may revoke an attorney's pro hac vice admission at any time; "Grounds for revocation include violations of the North Carolina Rules of Professional Conduct or any law or regulation, fraud, misrepresentation, lack of candor with the Court or other misconduct."); *In re Hake*, 398 B.R. 892, 900 (B.A.P. 6th Cir. 2008) (*pro hac vice* admission revoked for attorney who engaged in argumentative, disrespectful, and antagonistic conduct toward the bankruptcy court); *Obert*, F. Supp. 2d at 298 ("Disqualification is warranted if counsel has failed 'to fulfill the requirements of this rule or when the proper administration of justice so requires.' [Loc. Civ. R.] 5(c)(3) [(D.R.I.)]"); *United States v. Bennett*, No. 06-00068, 2006 U.S. Dist. LEXIS 70089 (D. Haw. Sept. 27, 2006) (*pro hac vice* admission revoked where attorney did not disclose suspension in another jurisdiction even when stayed by pending appeal); *United States v. Howell*, 936 F. Supp. 774 (D. Kan. 1996) (material omission appropriate for revocation of attorney's *pro hac vice* admission for failure to list all disciplinary and grievance proceedings in application).

Regarding the procedure of how a court may revoke a *pro hac vice* admission, the case of *Johnson v. Trueblood*, 629 F.2d 302 (3d Cir. 1980) has articulated that "some type of notice and an opportunity to respond are necessary when a district court seeks to revoke an attorney's pro hac vice status." *Id.* at 303. Not only does this promote the principle of due process, but it ensures against unnecessary damage to an attorney's reputation, and protects the interest of the client. *See Id.* However, the *Johnson* court was clear to point out that there cannot be one standard "type of notice required," but rather found "flexibility is dictated" and ultimately left the "form of the notice to the discretion of the district court with the limitation that it adequately inform the attorney of the basis upon which revocation is sought." *Id.* at 303–304; *accord Belue v. Leventhal*, 640 F.3d 567, 577 (4th Cir. 2011), *and Royce*, 950 F.3d at 954.

It is important to note, a "court's control over an attorney's *pro hac vice* status," seen in the power to grant and to revoke, "serves a critical function." *Belue v. Aegon USA, Inc.*, No. 08-cv-3830, 2010 U.S. Dist. LEXIS 15895, *6 (D.S.C. Feb. 23, 2010). Not only is this power necessary to maintain the authority of the court over those who appear before it, but it also serves to prevent an out-of-state attorney from flying it, committing violations, and then return to their home jurisdictions with impunity (perhaps to act in a similar fashion again in a separate court). *See Id.*; Loc. Civ. R. 83.17(a) and (b) (D.D.C.). Like the D.C. Circuit, the Fourth Circuit also lacks a deep well of caselaw on the issue, but there is at least one unpublished instance where that Circuit upheld a district judge's decision to revoke an attorney's *pro hac vice* status after failing to appear in court on the first day of a scheduled trial. *See In re Clark*, No. 88-5152, 1988 U.S. App. LEXIS 19783 (4th Cir. Oct. 4, 1988).

Sixth Amendment Considerations

Some courts have addressed the role which the Sixth Amendment plays in assessing both the granting, and revoking, of a *pro hac vice* privilege. While the 6th Amendment does grant broad latitude in allowing a defendant the right to choose their own counsel, the right is not absolute, and a court must balance the needs of a particular party with the public interest. *See United States v. Burton,* 584 F.2d 485, 489 (D.C. Cir. 1978). Furthermore, though "the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." *Wheat v. United States*, 486 U.S. 153, 159 (1988). While the Sixth Amendment pertains to criminal trials or trials where loss of liberty is at stake, the key element for the purposes of bankruptcy proceedings is the ability of a Debtor to have an effective advocate to assist with the proceedings. While the various bankruptcy Bars around the country could likely argue ad astra over which has the most preeminent attorneys, D.C. is not devoid of bankruptcy attorneys. Indeed, sitting in the nation's capital, and subordinate to the second most influential appellate court in the land, the U.S. Bankruptcy Court for the District of Columbia is not situated in some rural backwater, nor does it suffer from a paucity of competent legal talent in the field of bankruptcy.

Applicant Details

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Applicant Education

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Date of BA/BS	**May 2024**
JD/LLB From	**Georgetown University Law Center** **https://www.nalplawschools.org/employer_profile?FormID=961**
Date of JD/LLB	**May 19, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**The Georgetown Law Journal**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Georgetown Barristers' Council - Trial Advocacy Division**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

GARETT ELDRED

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June 20, 2023

Dear Judge Pitts,

I am a Haitian American and a rising 3L Opportunity Scholar at the Georgetown University Law Center, and I am writing to apply for a Judicial Clerkship in your chambers. I seek the role not only because it will be beneficial for my writing skills and career but also because it will give me the chance to earn a lifelong mentor. I am confident that I would be successful in your chambers due to my passion for the work, my dedication to excellence, and our shared set of interests and values. I strongly admire your passion for public service, which is evidenced by your "low bono" representation of clients from a wide range of disadvantaged groups and your volunteer experiences with the Legal Aid at Work's Workers' Rights Clinic. These distinctions, amongst others, are why I enthusiastically wish to clerk for you. I humbly believe that my experiences, skillset, and character make me an excellent candidate for this role.

Prior to pursuing a future in law, I established my work ethic and learned the value of teamwork as a Division I student-athlete. I would then earn employment as a filing clerk at Nall & Miller, LLP, where I began developing my writing skills through drafting and filing legal documents. The summer before entering law school, I further developed these skills at Greathouse Trial Law, LLC, by gathering precedent relevant to our cases and drafting legal documents.

Since entering law school, I have had several experiences that have equipped me with the requisite knowledge and skills to positively contribute to your chambers. I have gained an understanding of courtroom procedures by serving as a Judicial Extern in the Court of Federal Claims, Office of Special Masters, and through my membership on Georgetown's Trial Advocacy Team, which led me to win Georgetown's annual 100+ participant Greenhalgh Trial Advocacy Competition, amongst other awards. I was also able to garner practical experience as a Summer Associate at two law firms last summer and by working in-house at AT&T as well. Last fall, I further enhanced my research and writing skills by working as a Research Assistant to tenured Professor Madhavi Sunder.

Currently, I am honing my skills as the Senior Development Editor of *The Georgetown Law Journal* and by working as a Summer Associate at two firms again this summer. This fall, I will again serve as an extern in the public sector and as a Research Assistant to Professor Shon Hopwood. I will conclude my law school experience by completing hundreds of pro bono hours as a Student Attorney in Georgetown's Civil Rights Clinic to better serve those in need and further enhance my skills.

Most importantly, I would like to clerk for you because I believe that our similarities are indicative of shared interests and values. As a member of several civic organizations like yourself, I can better appreciate your passion for service and dedication to the principles that make lawyers stand out as pillars in our communities. Before entering law school, I upheld this commitment by establishing the "It Could Be You Initiative", an initiative created to serve the homeless population in Atlanta, GA, and by serving as the Community Service Chair for the Zeta Mu chapter of Alpha Phi Alpha Fraternity, Inc. Since entering law school, I have further worked to uphold this commitment by serving as the Community Service Chair of Georgetown's Black Law Students Association and by participating in service efforts with Georgetown's Christian Legal Society. I believe shared interests and principles lead to stronger relationships, which is why I am confident that my time in your chambers would be rewarding, productive, and harmonious if given the opportunity.

I hope to work and learn under your tutelage, and I welcome any opportunity to discuss my qualifications in greater detail. I can be reached at (678) 644-6717 or by email at gne5@georgetown.edu. Thank you so much for your consideration.

Best,

Garett Eldred

Garett Eldred

2350 Washington Place NE #518, Washington, DC 20018 • 678-644-6717 • gne5@georgetown.edu

EDUCATION

GEORGETOWN UNIVERSITY LAW CENTER — **Washington, D.C.**
Juris Doctor — May 2024
GPA: 3.42

Journal: *The Georgetown Law Journal*, Senior Development Editor Vol. 112

Honors:
Georgetown Greenhalgh Trial Advocacy Competition - First Place
Week One Teaching Fellow - Spring 2023
Greene Broillet & Wheeler National Civil Trial Competition - Honored Advocate
Opportunity Scholar
Kirkland & Ellis Afro Scholar
AT&T Scholar

Activities:
Barristers' Council - Trial Advocacy Division
Black Law Students Association
Christian Legal Society
RISE
Sigma Delta Tau Legal Fraternity, Inc.

GEORGIA STATE UNIVERSITY — **Atlanta, GA**
Bachelor of Science in Education — May 2021
Honors:
4X Dean's List
Division I Football Scholarship Recipient
Hope Scholarship Recipient
Mr. Unstoppable Winner

Activities:
Alpha Phi Alpha Fraternity, Inc.
Division I Student Athlete
NAACP at Georgia State University

EXPERIENCE

CIVIL RIGHTS CLINIC — **Washington, DC**
Student Attorney — January 2024 – May 2024
- Anticipating serving as the lead counsel on complex litigation matters in areas of voting rights, employment discrimination, housing discrimination, police brutality, conditions of carceral confinement, and equal protection in education, among others

GEORGETOWN UNIVERSITY LAW CENTER — **Washington, DC**
Research Assistant to Professor Shon Hopwood — September 2023 – December 2023
- Anticipating conducting research and delivering memorandums in areas of criminal and constitutional law

BALCH & BINGHAM LLP — **Atlanta, GA**
2L Summer Associate — July 2023 – August 2023
- Anticipating working on complex litigation matters in areas of financial service, healthcare, and energy

BAKER & HOSTETLER LLP — **Atlanta, GA**
2L Summer Associate — May 2023 – July 2023
- Created a slide deck presentation to propose improvements to a Major League Baseball team's Fan Guide and Giveaway Policy
- Drafted a memorandum evaluating the enforceability of a proposed resolution between a Section 8 property owner and a city
- Drafted a memorandum evaluating settlement amounts and reasons thereof for cases of inmate death due to deliberate indifference
- Drafted a memorandum evaluating the Plaintiff burden of proof in data breach cases across all twelve federal circuits
- Drafted a memorandum evaluating the enforceability of a liquidated damages provision in a service agreement between a major hospital and insurance provider
- Anticipating working on more complex litigation matters in areas of healthcare and labor and employment

U.S. COURT OF FEDERAL CLAIMS, OFFICE OF SPECIAL MASTERS — **Washington, DC**
Judicial Intern to Special Master Mindy Michaaels Roth — September 2022 – November 2022
- Drafted opinions related to Motions for Attorney's Fees and Costs based on the "reasonable basis for bringing the case" standard
- Drafted memorandums evaluating how cases should be decided in accordance with the standard of the Vaccine program
- Drafted questions to be asked by Special Master Roth to Expert Witnesses during hearings
- Attended a judicial conference hosted by the Court to learn more about effective advocacy and statutory interpretation

GEORGETOWN UNIVERSITY LAW CENTER **Washington, DC**
Research Assistant to Professor Madhavi Sunder September 2022 – December 2022

- Drafted a series of questions to be asked of Counsel for the Respondent in Georgetown's Moot of *Warhol v. Goldsmith*, a pending Supreme Court case pertaining to Copyright law
- Researched and found new Copyright issues to be discussed and debated amongst students in class
- Revised class powerpoints to be more electronically accessible and reflect recent development in Copyright law

BALCH & BINGHAM LLP **Atlanta, GA**
1L Summer Associate July 2022 – August 2022

- Drafted a memorandum evaluating the legality and constitutionality of a proposed statute's no class action clause and exclusive remedy provision
- Drafted a memorandum evaluating the elements and evidentiary burden of a claim for attorney's fees under OCGA § 13–6–11
- Drafted a memorandum evaluating the limits of an agreement's clause limiting damages to only those which are direct, and not consequential, under New Jersey law
- Assisted in the preparation of a pro-bono hearing regarding a temporary restraining order in Cobb County Magistrate Court.
- Drafted a memorandum evaluating the effects of an intervening clause within a consent order, and a revised intervening clause to clarify the agreement under Georgia law
- Drafted a memorandum evaluating how three Georgia statutes interplay with each other to determine the necessities to authenticate medical records and satisfy the "business records exception"
- Drafted a memorandum evaluating the elements and defenses of an inverse condemnation claim under Georgia law
- Drafted a memorandum evaluating the elements and defenses of a spoliation claim under Georgia law
- Drafted a memorandum evaluating the parameters of non-compete/non-solicit provisions within employment contracts, and a provision incorporating those parameters for an employment contract under Georgia law

AT&T **Atlanta, GA**
Summer Law Fellow July 2022

- Drafted a memorandum to resolve an anti-compete matter brought before the Public Utilities Commission of California
- Prepared for depositions of opposing witnesses and client witnesses to resolve labor and employment disputes
- Contributed viable arguments in strategic planning meetings, based on legal research, to resolve labor and employment disputes

KILPATRICK TOWNSEND & STOCKTON LLP **Atlanta, GA**
1L Summer Associate May 2022 – July 2022

- Drafted a memorandum evaluating the reach of a settlement agreement's "in connection with" clause despite a merger clause within the agreement, under Georgia law
- Drafted a memorandum evaluating the enforceability of a joint defense agreement under Tennessee law
- Created a slide deck used for arbitrating a trademark dispute for a Fortune 500 telecommunications holding company
- Drafted notices of opposition and closing letters for trademark disputes for a Fortune 500 sportswear manufacturer and Fortune 500 airline company
- Drafted portions of an agreement to eliminate cellular data within prisons to improve safety measures for a Fortune 500 telecommunications holding company
- Created a case calendar following FRCP and Local Rules for an employment discrimination case between a Fortune 500 telecommunications holding company and one of their former executives
- Volunteered for the firm's Law Camp for the Boys & Girls Club of Metro Atlanta by conducting a presentation on professional attire and coaching the winning team during the camp's Mock Trial Competition

GREATHOUSE TRIAL LAW, LLC **Atlanta, GA**
Litigation Assistant/Summer Intern May 2021 – August 2021

- Filed and sorted through evidence for the firm's most consequential personal injury cases
- Corresponded with clients daily to update them on case proceedings and to request documentation as needed
- Drafted dismissals and other necessary documentation to complete closing procedures
- Assisted in depositions and meetings with opposing counsel to offer support and learn more about the litigation process

NALL & MILLER, LLP **Atlanta, GA**
Filing Clerk December 2020 – April 2021

- Filed documents and corresponded with clients to manage a caseload of thirty matters relating to transportation law
- Drafted Request for Documents Forms to advance the process of discovery
- Independently oversaw the distribution of all mail for the firm's attorneys and staff
- Led in the reorganization of the office's layout and the transition from physical to digital case filing

VOLUNTEER EXPERIENCE

- Alpha Phi Alpha Fraternity, Inc. – Community Service Chairman, Dean of Membership, and Chaplain
- Georgetown Black Law Students Association – Community Service Chairman
- It Could Be You Initiative – President and Founder (An Initiative Established to Serve Atlanta's Homeless Population)
- NAACP at Georgia State University – Health Committee Chairman

Record of: Garett N. Eldred
GUID: 835231260

Course Level: Juris Doctor

Entering Program:
Georgetown University Law Center
Juris Doctor
Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2021							
LAWJ	001	94	Civil Procedure	4.00	B	12.00	
			Aderson Francois				
LAWJ	002	41	Contracts	4.00	B	12.00	
			Gregory Klass				
LAWJ	004	42	Constitutional Law I: The Federal System	3.00	B	9.00	
			Irving Gornstein				
LAWJ	005	43	Legal Practice: Writing and Analysis	2.00	IP	0.00	
			Erin Carroll				

	EHrs	QHrs	QPts	GPA
Current	11.00	11.00	33.00	3.00
Cumulative	11.00	11.00	33.00	3.00

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2022							
LAWJ	003	94	Criminal Justice	4.00	B	12.00	
			Christy Lopez				
LAWJ	005	43	Legal Practice: Writing and Analysis	4.00	B+	13.32	
			Erin Carroll				
LAWJ	007	94	Property	4.00	B+	13.32	
			Madhavi Sunder				
LAWJ	008	42	Torts	4.00	B+	13.32	
			Brishen Rogers				
LAWJ	304	50	Legislation	3.00	B+	9.99	
			Caroline Fredrickson				

	EHrs	QHrs	QPts	GPA
Current	19.00	19.00	61.95	3.26
Annual	30.00	30.00	94.95	3.17
Cumulative	30.00	30.00	94.95	3.17

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2022							
LAWJ	110	08	Copyright Law	3.00	A-	11.01	
			Madhavi Sunder				
LAWJ	126	05	Criminal Law	3.00	B+	9.99	
			Paul Butler				
LAWJ	1491	131	~Seminar	1.00	A-	3.67	
			Deborah Carroll				
LAWJ	1491	132	~Fieldwork 2cr	2.00	P	0.00	
			Deborah Carroll				
LAWJ	1491	47	Externship I Seminar (J.D. Externship Program)		NG		
			Deborah Carroll				
LAWJ	1493	05	Prison Law and Policy	3.00	A	12.00	
			Shon Hopwood				
LAWJ	360	05	Legal Research Skills for Practice	1.00	A	4.00	
			Rachel Jorgensen				

In Progress:

	EHrs	QHrs	QPts	GPA
Current	13.00	11.00	40.67	3.70
Cumulative	43.00	41.00	135.62	3.31

----------Continued on Next Column----------

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2023							
LAWJ	1196	08	Religion, Morality and Contested Claims for Justice Seminar	2.00	A-	7.34	
LAWJ	1265	05	Advanced Constitutional Law Seminar: The Creation of the Constitution	3.00	B+	9.99	
LAWJ	1335	05	Race, Inequality, and Justice	2.00	A-	7.34	
LAWJ	165	09	Evidence	4.00	A-	14.68	
LAWJ	1650	05	Income and Public Benefits	3.00	A	12.00	
LAWJ	351	02	Trial Practice	2.00	A	8.00	
LAWJ	610	05	Week One Teaching Fellows (Public Speaking For Lawyers)	1.00	P	0.00	

Transcript Totals

	EHrs	QHrs	QPts	GPA
Current	17.00	16.00	59.35	3.71
Annual	30.00	27.00	100.02	3.70
Cumulative	60.00	57.00	194.97	3.42

End of Juris Doctor Record

FROM THE CHAMBERS OF SPECIAL MASTER MINDY MICHAELS ROTH
UNITED STATES COURT OF FEDERAL CLAIMS
OFFICE OF SPECIAL MASTERS
717 MADISON PLACE
WASHINGTON, DC 20439

June 13, 2023

To Whom It May Concern:

I am pleased to provide a recommendation for Garett Eldred. I am a Special Master at the United States Court of Federal Claims, the court with exclusive jurisdiction over claims related to vaccine injuries. Garett was an intern in my chambers during the fall semester of his 2L year of law school in 2022. I was quickly impressed by Garett's ability to readily grasp new concepts. He was also a delight to have in Chambers.

Garett attended status conferences, a hearing, drafted memorandum and assisted with the drafting of decisions on Motions. Additionally, I assign each of my interns the task of drafting a memorandum on a challenging legal/medical issue. These assignments demand a thorough review of medical records and the study of medical conditions. This adds an element of complexity to the legal writing process with which most law students are unfamiliar. Additionally, these assignments call for more foundational legal writing exercises, such as the summarization of facts and procedural history. Finally, and most importantly, impeccable legal analysis is vital in all decisions, as Vaccine Program cases are appealable to the Unites States Court of Federal Claims. Garett was assigned the task of drafting a decision in a case in which a complicated medical issue was involved. Garett's work was on par with what I expect of my new law clerk hires. Garett showed growth in his writing abilities over the semester due to his genuine desire to learn and improve.

Garett is intelligent, diligent, mature, and professional, as was demonstrated through his demeanor and work product. Working with Garett was a genuine pleasure. I am confident that he would be as welcome an addition to your chambers as he was to my chambers. In the event you may wish to discuss Garett's qualifications further, I can be reached at (202) 403-9006.

Sincerely,

Mindy Michaels Roth
Mindy Michaels Roth
Special Master

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 20, 2023

The Honorable P. Casey Pitts
Robert F. Peckham Federal Building & United States Courthouse
280 South 1st Street, Room 2112
San Jose, CA 95113

Dear Judge Pitts:

I am writing this letter with enthusiastic support for Garett Eldred, who is applying for a clerkship in your chambers. I write to share my experiences as his professor, and why he has demonstrated that he would be a great fit for a clerkship.

Garett is a Haitian America, first-generation law school student with many admirable qualities. I first noticed those qualities when he attended my Prison Law and Policy class this past semester, where we cover issues facing incarcerated people, caselaw on their rights, and how, as a policy matter, we can fix the American criminal justice system. Garett's comments were always illuminating and showed a genuine hunger for community service, a humbleness to understand the issues, along with grit and wisdom.

Garett's childhood in Atlanta would lead him to both good and bad parts of town, where he developed a keen understanding of how to connect with people regardless of their background or differences. I believe this characteristic is indicative of why he would make a great clerk. Through my conversations with Garett and his participation in my course, I have found him to be both of strong conviction, but also with the discernment to know how to disagree without being disagreeable. Garett's also possesses a consistent professionalism that would make him an ideal clerk, and that is why I am proud to offer this letter on his behalf.

Garett deeply desires to make change in the world. During his days in undergraduate school, Garett created the "It Could Be You Initiative," a program designed to help the homeless population in and around Georgia State University. He has continued that service at Georgetown Law through his service in the Black Students Association, the RISE program, and Christian Legal Society.

Garett also has the legal chops to be worthy of a clerkship. He won the trial advocacy competition; he is an editor on the Georgetown Law Journal; and he scored an A in my class, one of the best grades on my admittedly difficult exam that tests both the application of legal principles and policy issues. He has also received several awards. His GPA has consistently gone upward since his first semester (a trait I see with many first-generation law school students), which provides a positive trend for his clerkship prospects. And he has secured a summer associate position at Baker & Hostetler in Atlanta, where he plans to practice.

But what makes Garett special is his personality. He is a thoughtful and engaging person. The kind of person who is equally adept at discussing criminal justice policy, the rules of statutory interpretation, or college football. He was a joy as a student, and I have no doubt he will make an excellent clerk. And he desires a clerkship for the right reason, as he wants the experience to become a better lawyer and to serve the public.

If you need any additional information, please do not hesitate to contact me.

Sincerely,

Shon Hopwood
Associate Professor of Law

Shon Hopwood - srh90@georgetown.edu

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 20, 2023

The Honorable P. Casey Pitts
Robert F. Peckham Federal Building & United States Courthouse
280 South 1st Street, Room 2112
San Jose, CA 95113

Dear Judge Pitts:

I am writing to recommend Garett Eldred for a clerkship. Garett was a student in my Criminal Law class. He was an active participant in class discussion and stopped by frequently during office hours. I serve as a faculty advisor to the Georgetown Black Law Student Association, and I have also gotten to know Garett through his leadership roles in that organization, including his work as chairperson for community service. Based on these experiences I recommend him with great enthusiasm.

Garett is an extremely bright, ambitious, and disciplined student with a great work ethic. He distinguished himself in my course with his insightful legal analysis and strong communications skills. I think these qualities would serve him well in a clerkship. They are evidence of the high expectations Garett sets for himself, and his ability to deliver. As a member of the prestigious Georgetown Law Journal, which is the flagship legal journal at our school, Garett has had an excellent opportunity to advance his research and writing skills. I am impressed, but not surprised, that Garett has performed exceptionally in trial advocacy competitions, including finishing in first place in the Georgetown Greenhalgh Trial Advocacy Competition.

I should also note that Garett is an exceptionally kind and mature law student. He is warm, respectful, has a fine sense of humor and a great personality. He would be the kind of law clerk that everyone in the courthouse likes, respects, and admires. He is very excited about the potential of a clerkship and I have no doubt that you would find him to be an asset to your chambers. I know that you have many highly qualified applications. I respectfully urge your consideration of Garett. I think you would be extremely satisfied with his work and his character.

Respectfully,

Paul D. Butler
The Albert Brick Professor in Law

Paul Butler - paul.butler@law.georgetown.edu

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 20, 2023

The Honorable P. Casey Pitts
Robert F. Peckham Federal Building & United States Courthouse
280 South 1st Street, Room 2112
San Jose, CA 95113

Dear Judge Pitts:

It is my sincere pleasure to provide my highest and most enthusiastic recommendation for Mr. Garett Eldred to be a judicial law clerk in your chambers. Mr. Eldred is one of our shining stars at Georgetown Law. An Opportunity Scholar, he is an award-winning student advocate and an editor of the prestigious *Georgetown Law Journal*. He is a student who has successfully balanced a broad array of extracurricular activities with academic excellence and an ongoing commitment to serving the public interest. He would make an excellent law clerk in your chambers.

I have known Mr. Eldred for almost two years. He has been a model student in both my 1L Property course (Spring 2022) and my upper level Copyright Law course (Fall 2022). Additionally, Mr. Eldred served as my Research Assistant during the Fall 2022 semester, during which time I observed him seamlessly juggle his coursework, research, and extensive extracurricular activities. As Mr. Eldred's professor, supervisor, and mentor, I have seen his passion for the law and his commitment to excellence firsthand. We have had numerous conversations discussing his legal aspirations. He always sat in the front row of my class and consistently offered contemporary applications of our coursework, some of which I incorporated into my PowerPoints to teach the rest of the class.

Mr. Eldred's academic achievement in law school has steadily improved each semester and I am confident that his legal analysis and writing skills are very strong. He received an A- in my copyright course this past semester, just missing the cutoff for an A by a few points. His final exam demonstrated mastery of the wide range of legal concepts covered in the class, and strong organizational, critical thinking, and writing skills.

Even more important is Mr. Eldred's work ethic, drive to learn and develop mastery, and commitment to obtain work and extracurricular experiences that will help him to continually build his research, writing, and advocacy skills. His achievements here are extraordinary. As an undergraduate he received the aptly named honorific of "Mr. Unstoppable"—indeed, Mr. Eldred has continued to be unstoppable at Georgetown Law! He won first place in the Georgetown Greenhalgh Trial Advocacy Competition and was named an Honored Advocate in the Greene Broillet & Wheeler National Civil Trial Competition. Mr. Eldred is the first Black man to win Georgetown's Greenhalgh Trial Advocacy Competition. (His co-counsel was the first Black woman to obtain the same feat.) Mr. Eldred aspires to be the first Black man to be editor-in-chief of the *Georgetown Law Journal*, and I am confident he can achieve this!

Mr. Eldred hopes to one day be a litigator and courtroom attorney. To this end, in addition to his demanding extracurricular activities, he has pursued a diverse set of work experiences that set him up to be an enormously successful judicial law clerk and attorney. Last summer, he worked in three settings, serving as a law fellow at AT&T, Balch & Bingham LLP, and Kilpatrick Townsend & Stockton LLP in Atlanta. (The three impressive offers demonstrate what an attractive and sought after candidate Mr. Eldred is!) Mr. Eldred wrote numerous memoranda and drafted a variety of legal documents in these roles. He further honed his legal research and writing skills with an externship in the court of Federal Claims, as an Editor of the *Georgetown Law Journal*, and as my research assistant. Mr. Eldred is conscientious and deliberate about seeking out opportunities – such as this clerkship – that will make him the very best advocate he can be.

As my research assistant, Mr. Eldred handled numerous assignments and impressed me with his thoroughness and attention to detail. On one assignment applicable to his work as a clerk, Mr. Eldred provided me with questions to ask during Georgetown's Law's moot of Warhol v. Goldsmith, a copyright case before the Supreme Court in which I was asked to serve on the panel questioning the attorney arguing the case before the Supreme Court. Mr. Eldred's questions were sharp and relevant, and were among questions we also debated in my Copyright class amongst the students as we discussed the viability of the arguments made in the case.

At the same time, Mr. Eldred has been and continues to be committed to public service work. While in college, he established the "It Could Be You Initiative," which sought to feed, clothe, and uplift the homeless population surrounding Georgia State University. At Georgetown Law, Mr. Eldred serves as the Community Service Chair of the Black Law Students Association and is an avid participant in the school's Christian Legal Society. These endeavors demonstrate Mr. Eldred's commitment to not only honing his skills as a writer and advocate, but also his commitment to being a grounded servant for humanity. I am confident that Mr. Eldred will continue to dedicate himself to pro bono work in the public interest to help others less fortunate to have the opportunities that were so critical for him.

That Mr. Eldred performed his work for me so well while being involved in numerous and significant extracurricular activities is notable. Mr. Eldred's discipline and time management skills, which he learned during his time as a Division 1 Student Athlete,

Madhavi Sunder - ms4402@georgetown.edu - (202) 662-4225

enable him to give serious attention to all of these organizations and activities without neglecting his coursework, which is truly admirable.

Mr. Eldred's impressive resume notwithstanding, my favorite thing about Mr. Eldred is his warm, charismatic, and kind personality. He is amicable and adaptable, able to get along with pretty much anyone. Mr. Eldred had a nomadic upbringing with multiracial parents. This allowed him to come in contact with people from all walks of life, and equipped him with a welcoming and inclusive spirit. As a clerk, Mr. Eldred will be working very closely with his judge and fellow clerks. I am confident that Mr. Eldred will be a joy and delight to work with.

I unreservedly give my very highest recommendation to Mr. Eldred. I am confident that he has the work ethic, skillset, personality, and intellectual acuity required to be a successful judicial clerk. Thank you for your consideration, and please feel free to contact me with further questions at ms4402@georgetown.edu.

Sincerely,

Madhavi Sunder
Frank Sherry Professor of Intellectual Property
Associate Dean for International and Graduate Programs

GARETT ELDRED

2350 Washington Place NE #518, Washington, DC 20018 • 678-644-6717 • gne5@georgetown.edu

WRITING SAMPLE

The following is a case comment I wrote in June 2022 for the Georgetown University Law Center Law Journal Write-On Competition. I was required to draw on a limited packet of sources to produce a comment no longer than 2,200 words, excluding footnotes. The comment was titled "Inaction Calls for Action: Why the Tenth Circuit's Determination that the Defendants in *Strain* were not Deliberately Indifferent was Incorrect." This case comment is my own independent work.

I. Introduction

"The Fourteenth Amendment prohibits deliberate indifference to a pretrial detainee's serious medical needs."[1] Circuit courts have disagreed on the proper standard for a pretrial detainee's deliberate indifference claim.[2] This disagreement stems from how the courts interpret the Supreme Court's holding in *Kingsley v. Hendrickson*.[3]

Kingsley set forth an objective standard for pretrial detainee excessive force claims which only require that an official *should have* known that his actions were unreasonable.[4] The Court chose an objective standard as opposed to the subjective standard used for convicted prisoners' excessive force claims which require a subjective display of malicious intent.[5] The Court reasoned that there is a greater need to protect pretrial detainees than convicted prisoners because pretrial detainees are presumed completely innocent.[6] Thus, the Court set forth a more lenient standard, easing the burden on pretrial detainees who seek redress for their suffered harm.[7]

The Second and Ninth Circuits have extended *Kingsley*'s objective standard to pretrial detainee deliberate indifference claims.[8] The Fifth, Seventh, Eighth, Tenth, and Eleventh Circuits have declined to extend *Kingsley*'s objective standard and instead set forth a more stringent subjective standard, requiring a plaintiff to show proof that a jail official was subjectively aware of a pretrial detainee's serious medical need.[9]

A. Background of Strain

The morning after Thomas Pratt (Mr. Pratt), a pretrial detainee, was booked into the Tulsa County Jail (the Jail), he complained of alcohol withdrawal and requested detox mediation.[10] A nurse conducted a drug and alcohol withdrawal assessment of Mr. Pratt that afternoon where he informed her that he had habitually drank fifteen-to-twenty beers per day for the past decade.[11]

Staff admitted Mr. Pratt to the Jail's medical unit, conducted a mental health assessment, documented his withdrawal symptoms, but never gave him the requested detox medication.[12]

Days later, a jail nurse conducted a withdrawal assessment, which revealed worsening symptoms.[13] The nurse finally gave Mr. Pratt Librium but it proved ineffective.[14] Despite the severity of Mr. Pratt's symptoms, and an assessment tool advising the nurse to contact a physician, the nurse failed to contact a physician.[15] The nurse also failed to check Mr. Pratt's vitals or perform any additional assessments.[16]

Approximately eight hours later, a jail doctor examined Mr. Pratt and noticed a two-centimeter cut on his forehead and a pool of blood in his cell.[17] The doctor, aware of Mr. Pratt's earlier symptoms from his medical records, observed Mr. Pratt's disoriented state, but only gave him Valium without sending him to the hospital for suitable care.[18] Another nurse encountered Mr. Pratt later that afternoon and noted that he needed assistance with daily living activities.[19] Yet again, the staff did not escalate Mr. Pratt's level or place of care.[20]

The next morning, a licensed professional counselor (LPC) conducted a mental health evaluation of Mr. Pratt.[21] The LPC observed Mr. Pratt struggling to answer questions and determined the cut on his forehead was unintentional.[22] Nevertheless, the LPC declined to seek further care for Mr. Pratt.[23]

That afternoon, the doctor assessed Mr. Pratt again and noted that he was underneath the sink in his cell with a cut on his forehead.[24] Another nurse observed Mr. Pratt around midnight, but he would not get up, so she did not check his vitals.[25] Just before 1 a.m., a detention officer found Mr. Pratt lying motionless on his bed and called for a nurse. Mr. Pratt had suffered a cardiac arrest and was then finally sent to the hospital.[26] The hospital later discharged Mr. Pratt with a seizure disorder and other ailments that left him permanently disabled.[27]

Mr. Pratt's guardian, Faye Strain (Ms. Strain) brought a § 1983 action against county officials, jail medical staff, and municipalities for their deliberate indifference to Mr. Pratt's serious medical needs.[28] Ms. Strain argued that deliberate indifference to a pretrial detainee's serious medical needs includes only an objective component and that there were sufficient facts to support her claim that the defendants were deliberately indifferent.[29] The defendants argued that deliberate indifference to a pretrial detainee's serious medical needs includes both an objective and a subjective component, and that Ms. Strain met neither component.[30] The District Court agreed with the defendants, granting their motions to dismiss.[31] Ms. Strain appealed to the Tenth Circuit.[32]

B. Holding

The Tenth Circuit affirmed the lower court's ruling.[33] Judge Carson, writing for the court, held that Ms. Strain failed to allege sufficient facts to support her deliberate indifference claims.[34] The court reasoned that *Kingsley v. Hendrickson* applied solely to excessive force claims, not on the status of the detainee, and thus should not be extended to deliberate indifference claims brought by pretrial detainees.[35] Next, they asserted that deliberate indifference infers a subjective component.[36] They concluded that the defendants were not deliberately indifferent and held that Ms. Strain's complaint failed to show that the defendants were subjectively aware of Mr. Pratt's serious medical needs and acted objectively unreasonable under the circumstances.[37] They further held that the municipality defendant could not be held liable because Ms. Strain did not allege a systematic failure of multiple officials equating to a constitutional violation.[38]

C. Roadmap

The Tenth Circuit incorrectly granted the defendants' motions to dismiss because Ms. Strain alleged sufficient facts to support her deliberate indifference claims. This comment argues that the Supreme Court's objective standard should be logically applied to pretrial detainee deliberate

indifference claims for two reasons. First, *Kingsley* uniquely applies to pretrial detainees. Second, the defendants were both objectively and subjectively aware of the substantial risk of harm regarding Mr. Pratt's serious medical needs. Next, this comment argues that the defendants' inaction was unreasonable under the circumstances and amounted to more than mere negligence. Finally, this comment argues that the facts alleged indicate a custom or policy of the municipality defendant sufficient to hold them liable for deliberate indifference to Mr. Pratt's serious medical needs.

II. Analysis

A. The Kingsley standard applies to pretrial detainee deliberate indifference claims.

A holding can be extended to an issue distinct from the one it addresses if doing so would be logical.[39] Broad wording indicates that a holding can be logically extended beyond the exact issue it addresses.[40]

The Tenth Circuit declines to extend the objective standard used for pretrial detainee excessive force claims in *Kingsley* to pretrial detainee deliberate indifference claims.[41] The court argues that it is inappropriate to consider the *Kingsley* decision dispositive because it specifically addressed pretrial detainee excessive force claims, which are not the issue precisely presented in the case.[42] By doing so, the court erroneously focuses solely on the differences between the issues in each case instead of their similarities. The court ignores the principle that a holding can be extended so long as doing so is logical.

The extension is logical because the broad wording of *Kingsley* indicates that it may be extended beyond what it addresses. The *Kingsley* rule rested on the detainee's status and not excessive force,[43] as the court suggests.[44] Evidence of this is the remaining subjective standard for convicted prisoners' excessive force claims.[45] Further, the term "pretrial detainee" is used

significantly more than "excessive force," in the opinion,[46] and when "excessive force" is used, it is almost exclusively in conjunction with "pretrial detainee."[47] Thus, the *Kingsley* objective standard should logically apply to pretrial detainee deliberate indifference claims.

B. The defendants were objectively and subjectively aware of Mr. Pratt's medical needs.

Following the *Kingsley* objective standard, a plaintiff need only show that a defendant-official knew, or should have known, that the pretrial detainee's medical condition posed a serious risk to health or safety.[48] A defendant *should know* something if it is their responsibility to address it.[49] The subjective standard requires the defendant to have (i) *actually known* that the plaintiff's medical condition posed a serious risk, or (ii) that the risk was obvious.[50]

Objectively, as his medical and mental caretakers, every defendant *should have* known of Mr. Pratt's serious medical needs because it was their responsibility to address them.[51] However, even under the more stringent subjective standard, the facts alleged indicate that the defendants *actually knew* of Mr. Pratt's serious medical needs, and that the needs were obvious. Mr. Pratt told the defendants about his habitual drinking from the time he entered the facility, and they witnessed his conditions worsen.[52] They were advised to seek additional help by a medical device and witnessed him curled up in a pool of blood with a cut on his head.[53] They witnessed him disoriented and struggling to answer questions.[54] They were even advised that he needed alternative living arrangements and saw him lying motionless in bed.[55] These facts indicate that the defendants were aware of the serious risk to Mr. Pratt's health; even if they were not, the risk was obvious.

C. A reasonable jail official, or medical staffer would have done substantially more to treat Mr. Pratt's serious medical needs.

If a defendant knows or should know that a plaintiff's medical condition poses a serious risk to health or safety, and they disregard it, they will be held liable for deliberate indifference.[56] The

plaintiff must prove more than negligence but substantially less than subjective intent.[57] A person need only "consciously disregard"[58] a substantial risk by acting intentionally (on their own accord) and not by accident.[59] Conduct that is more than mere negligence includes grossly inadequate care, administering easier but less effective treatment, administering treatment that is so cursory as to amount to no medical care at all, and delaying necessary medical treatment.[60]

Here, the facts do not indicate that the actions or inaction taken by the defendants were by accident.[61] Thus, a ruling in the light most favorable to the plaintiffs would result in a finding that the defendants acted intentionally (on their own accord).

The alleged conduct signifies a reckless disregard more than mere negligence because it is an easier but less effective treatment, and so cursory as to amount to no medical care at all. After witnessing all the facts alleged, the defendants are said to have done nothing more than assess Mr. Pratt's needs and give him sedatives.[62] The Tenth Circuit argues that Ms. Strain's complaint goes toward the efficacy of treatment and not whether treatment was administered at all.[63] The court's understanding is faulty because though treatment that proves ineffective is not grounds for a deliberate indifference claim, assessing one's needs and prescribing sedatives cannot be deemed to be treatment.

Assessing needs only helps recognize and track medical needs but does nothing to treat them. Sedatives simply put a blanket over the actual need by easing side effects without treating the issue causing the effects – like giving Ibuprofen to someone with a gunshot wound. It was a lot easier for jail officials to simply feed Mr. Pratt sedatives instead of actually treating his serious medical needs. Furthermore, by delaying treatment until Mr. Pratt went into cardiac arrest, the jail officials heightened the likelihood of his harm. A reasonable jail official or medical staffer would have done

substantially more to treat Mr. Pratt's serious medical needs, and therefore the defendants' alleged inaction amounted to deliberate indifference.

D. The facts alleged indicate the municipality defendant has a custom or policy of deliberate indifference toward pretrial detainees' serious medical needs.

A municipality defendant can be held liable when shown to have a custom or policy which leads to a plaintiff's injuries.[64] In such a case, "the combined actions of multiple officials can amount to a constitutional violation even if no one individual's actions were sufficient."[65] A municipality can demonstrate a custom or policy of providing delayed emergency medical treatment to inmates by just their actions or inactions as opposed to a written policy or rule.[66] "Systemic deficiencies"[67] and "repeated examples of delayed or denied medical care"[68] can provide the basis for a finding of deliberate indifference.

Here, the facts alleged demonstrate repeated examples of delayed or denied medical care by individuals within the municipality. On several occasions, the facts alleged reveal that employees of the municipality assessed Mr. Pratt's serious medical needs and failed to act, resulting in permanent disability.[69] The repetitiveness of the issue indicates a custom or policy of delayed or denied medical care. Thus, Ms. Strain stated a valid claim based on the facts alleged, and the district court erred in granting the municipality defendant's motion to dismiss.

E. Conclusion

The facts alleged indicate that Ms. Strain's deliberate indifference claims were sufficient to survive a motion to dismiss. First, *Kingsley* uniquely applied to pretrial detainees, and the Supreme Court's objective standard can be logically applied to pretrial detainee deliberate indifference claims. Secondly, the defendants were both objectively and subjectively aware of the substantial risk of harm regarding Mr. Pratt's serious medical needs. Third, the defendants' inaction was

unreasonable under the circumstances and amounted to more than mere negligence. Finally, the facts alleged indicate a custom or policy of the municipality defendant sufficient to hold them liable for deliberate indifference. Thus, the court erred in their judgement.

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[1] *Strain v. Regalado*, 977 F.3d 984, 987 (10th Cir. 2020).

[2] Some Circuits believe that pretrial detainee deliberate indifference claims warrant an objective standard, while others believe the standard should be subjective. *See, e.g.*, *Darnell v. Pineiro*, 849 F.3d 17, 29 (2d Cir. 2017); *Castro v. County of Los Angeles*, 833 F.3d 1060, 1069 (9th Cir. 2016). *But see, e.g.*, *Alderson v. Concordia Parish Correctional Facility*, 848 F.3d 415, 419 (5th Cir. 2017); *Whiting v. Marathon County Sheriff's Dept.*, 382 F.3d 700, 703 (7th Cir. 2004); *Whitney v. City of St. Louis, Missouri*, 887 F.3d 857, 860 (8th Cir. 2018); *Strain*, 977 F.3d at 987; *McElligott v. Foley*, 182 F.3d 1248, 1255 (11th Cir. 1999).

[3] *See generally Kingsley v. Hendrickson*, 576 U.S. 389 (2015) (initiating an objective standard for excessive force claims brought by pretrial detainees).

[4] *See id.* at 389–90.

[5] *See id.*

[6] *See id.*

[7] *See id.*

[8] The Second and Ninth Circuits have held that the *Kingsley* objective standard should be applied to pretrial detainee deliberate indifference claims. *See, e.g.*, *Darnell*, 849 F.3d at 29; *Castro*, 833 F.3d at 1069.

[9] The Fifth, Seventh, Eighth, Tenth, and Eleventh Circuits have held that the *Kingsley* objective standard does not apply to pretrial detainee deliberate indifference claims. *See, e.g.*, *Alderson*, 848 F.3d at 419; *Whiting*, 382 F.3d at 703; *Whitney*, 887 F.3d at 860; *Strain*, 977 F.3d at 987; *McElligott*, 182 F.3d at 1255.

[10] *See Strain*, 977 F.3d at 987.

[11] *See id.*

[12] *See id.*

[13] *See id.* at 988.

[14] *See id.*

[15] *See id.*

[16] *See id.*

[17] *See id.*

[18] *See id.*

[19] *See id.*

[20] *See id.*

[21] *See id.*

[22] *See id.*

[23] *See id.*

[24] *See id.*

[25] *See id.*

[26] *See id.*

[27] *See id.*

[28] *See id.*

[29] *See id.* at 989.

[30] *See id.*

[31] *See id.* at 988.

[32] *See id.*

[33] *See id.* at 987.

[34] *See id.* at 989.

[35] *See id.* at 991.

[36] *See id.*

[37] *See id.* at 995–96.

[38] *See id.* at 997.

[39] *See Gordon v. County of Orange*, 888 F.3d 1118, 1124 (9th Cir. 2018).

[40] *See Castro*, 833 F.3d at 1070.

[41] *See Strain*, 977 F.3d at 991.

[42] *See id.*

[43] *See generally Kingsley*, 576 U.S. 389 (initiating an objective standard solely for excessive force claims brought by pretrial detainees).

[44] *See generally Strain*, 977 F.3d 984 (holding *Kingsley* was unique to excessive force claims).

[45] *See Kingsley*, 576 U.S. at 400.

[46] *See generally Kingsley*, 576 U.S. 389.

[47] *See generally Kingsley*, 576 U.S. 389.

[48] *See Darnell*, 849 F.3d at 35.

[49] *See Miranda v. County of Lake*, 900 F.3d 335, 343 (7th Cir. 2018) (holding that jail officials should not have known about pretrial detainee's medical condition because it was primarily the responsibility of medical professionals whom they could reasonably rely upon).

[50] *See Castro*, 833 F.3d at 1068, 1072.

[51] *See Strain*, 977 F.3d at 987.

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *See Darnell*, 849 F.3d at 27, 29.

[57] *See Castro*, 833 F.3d at 1071.

[58] *Id*. at 1085.

[59] *See id.*

[60] *See Davies v. Israel*, 342 F.Supp.3d 1302, 1308 (S.D. Fla., 2018).

[61] *See Strain*, 977 F.3d at 987.

[62] *See id.*

[63] *See id.* at 995.

[64] *See Castro*, 833 F.3d at 1075.

[65] *Strain*, 977 F.3d at 997.

[66] *See Castro*, 833 F.3d at 1075.

[67] *Davies*, 342 F.Supp.3d at 1309.

[68] *Id.*

[69] *See Strain*, 977 F.3d at 987.

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WRITING SAMPLE

The following is an appellate brief I wrote in April 2022 for my 1L Legal Practice: Writing/Analysis course. I was assigned to represent the defendant and required to draw on a fact pattern and independently find relevant case law to produce a brief no longer than 2,700 words. This brief is my own independent work.